In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-638

FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

BURLEIGH HOUSE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

SAM DANIELS, ESQUIRE
1414 duPont Building
Miami, Florida 33131
and
PODHURST, ORSECK & PARKS, P.A.
Suite 1201, 25 West Flagler Street
Miami, Florida 33130

Attorneys for Petitioner

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A.

OPINIONS BELOW

This petition directly involves violation of the 14th Amendment Equal Protection Clause, and, in the same vein, violation of the Supremacy Clause, Article 6, United States Constitution. The petitioner, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, seeks a writ of certiorari to review the judgment-opinion and decision of the Third District Court of Appeal of Florida, in the case of *Financial Federal Savings and Loan Association, Appellant, v. Burleigh House, Inc., Appellee*, Fla.App. 1974, 305 So.2d 59 [case no. 73-1195; decision and opinion dated November 12, 1974; petition for rehearing denied January 9, 1975]. The trial court had entered a judgment for the respondent BURLEIGH HOUSE, INC. [the respondent here], against the petitioner in the total amount of $652,169.24, on an allegedly usurious loan. The Third District Court of Appeal affirmed the finding of usury but modified the judgment and reduced the recovery to $574,169.24, finding that the fee paid to the petitioner for the underlying loan commitment was not interest and thus deducted this amount from the award. In all other respects, the judgment was affirmed.

The petitioner filed a petition for a writ of certiorari, in the Florida Supreme Court, seeking review of the judgment, decision and opinion of the Third District Court of Appeal. The Supreme Court first granted the petition for a writ of certiorari, finding an apparent jurisdictional direct conflict of Florida decisions on the issues involved, and then, after briefs on the merits and oral argument,

discharged the writ in a 4-3 decision, finding no jurisdiction; *Financial Federal Savings & Loan Association, Petitioner, v. Burleigh House, Inc., Respondent*, Fla.1976, 336 So.2d 1145 [case no. 46,797 in Florida Supreme Court; majority opinion and decision and dissent dated July 21, 1976; petition for rehearing denied September 30, 1976].

Thus, the decision, judgment and opinion to which this petition is addressed, is the decision of the Third District Court of Appeal, under Florida law.

Copies of the following decisions, opinions and judgments are appended hereto:

Appendix A—Order of Third District Court of Appeal affording stay to the petitioner (appellant) for 30 days, conditioned upon filing of petition for writ of certiorari in the U.S. Supreme Court (A. 1)

Appendix B—Order of Supreme Court of Florida, dated September 30, 1976, denying petition for rehearing (A. 2)

Appendix C—Opinion of majority of Supreme Court of Florida discharging writ of certiorari for absence of jurisdiction (A. 3-7); and dissenting opinion (A. 7-12)[1]

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[1]A: Appendix to this Petition

R: Reference to pages in record on appeal

T: Reference to pages of trial transcript contained in record on appeal

Appendix D—Writ of certiorari, issued by Supreme Court of Florida, bearing date November 7, 1975 (A. 13)

Appendix E—Order of Third District Court of Appeal, dated January 9, 1975, denying petition for rehearing (A. 15)

Appendix F—Opinion and decision of Third District Court of Appeal, bearing date November 12, 1974, affirming finding of usury and modifying final judgment (305 So.2d 59; A. 16-23)

Appendix G—Final judgment of Circuit Court of the Eleventh Judicial Circuit of Florida, In and For Dade County, finding for respondent, BURLEIGH HOUSE, INC. in total amount of $652,169.24 plus costs (A. 24-32); and including findings of fact and conclusions of law; bearing date September 17, 1973

B.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the District Court of Appeal of Florida, Third District, bears date November 12, 1974. Petition for rehearing was denied January 9, 1975 (A. 15). A petition for a writ of certiorari was filed in the Florida Supreme Court, and the writ issued on November 7, 1975 (A. 13). However, after filing of briefs and oral argument on the merits, the Supreme Court of Florida discharged the writ, finding that it had no jurisdiction (Appendix C,

A. 3-7). The Supreme Court of Florida denied a petition for rehearing, addressed to its four-three discharge of the writ, by order dated September 30, 1976 (Appendix B, A. 2). Jurisdiction of this Court thus timely is sought and invoked. Jurisdiction is invoked pursuant to 28 U.S.C. §1257, subdivision 3; and 28 U.S.C. §2101(c); and Supreme Court of the United States, Revised Rules, effective July 1, 1970, Rule 19(1)(a); Rule 21; Rule 22(3) and Rule 23. The petitioner contends that the Third District Court of Appeal of Florida rendered a decision herein "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." (28 U.S.C. §1257(3)).[2] Violation of the equal protection clause of the 14th Amendment; and, or the Supremacy Clause of U.S. Const., Article 6, is claimed.

Review is timely sought after exhaustion of efforts to obtain full review in the Florida Court system.

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[2]The state Supreme Court of Florida declined to exercise jurisdiction, or held that it had no jurisdiction. Thus, review appropriately is sought of the judgment and decision of the Third District Court of Appeal, the highest court of appeal that rendered a decision here and the highest court of the State in which a decision "could be had". Thus review of the decision of the Third District Court of Appeal is appropriately sought (28 U.S.C. §1257; *Randall v. Board of Commissioners*, 261 U.S. 252, 43 S.Ct. 252; *American Express Co. v. Levee*, 252 U.S. 19, 44 S.Ct. 11).

C.

QUESTION PRESENTED FOR REVIEW ON MERITS

WHETHER DECISION OF THIRD DISTRICT COURT OF APPEAL CONSTRUED FLORIDA STATUTES IN AN UNCONSTITUTIONAL MANNER, SO AS TO EXEMPT FROM THE USURY STATUTES OF FLORIDA STATE SAVINGS AND LOAN ASSOCIATIONS, BUT NOT FEDERAL SAVINGS AND LOAN ASSOCIATIONS SIMILARLY SITUATED, THUS RENDERING STATUTES UNCONSTITUTIONAL

D.

STATUTES AND REGULATIONS INVOLVED

Various Florida Statutes, governing building or savings and loan associations, and the 14th Amendment and Article 6, U.S. Constitution, directly are involved:

1. F.S. 665.161 (1967) which provides:

   "No fines, interest or premiums paid on loans made by *any* building and loan association shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state and according to the terms and stipulations of the agreement between the association and the borrower." (Emphasis supplied)

2. F.S. 665.01 (1967) which provides:

   "*Every* association heretofore or hereafter incorporated under *any* law providing for the incorpora-

tion of building, loan fund and saving associations, *and* every association heretofore or hereafter *incorporated under any law* for the purpose of accumulating funds for the use and benefit of its members and of assisting them to accumulate money and to invest their funds and savings by cash or periodical payments on its stock or otherwise, to be loaned among its members, shall be known *in this chapter as a building and loan association, and shall be subject to the provisions of this chapter except as stipulated in §665.33. Associations organized under the laws of this State shall be known as 'domestic' associations, and those organized under laws of any other state, territory or nation, shall be known as 'foreign' associations.* Such 'domestic' associations may carry out their purposes, and may be organized in part or wholly under the general laws of Florida relating to corporations, except as otherwise provided in this chapter." (Emphasis supplied)

3. F.S. 665.40 (1967) which provides:

   ". . . Federal savings and loan associations and stockholders therein shall be entitled to the same exemptions from taxation *or otherwise* that are now provided by law or which may hereafter be provided by law for Florida building and loan associations and all laws now existing, providing any such exemptions are hereby made applicable to federal savings and loan associations and stockholders therein." (Emphasis supplied)

4. F.S. 687.031 (1967) which provides:

> "Sections 687.02 and 687.03 shall not be construed to repeal, modify or limit any or either *of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury* (chapter 687) and specifying the interest rates and charges which may be made pursuant to such exceptions, including but not limited to those exceptions which relate to banks, Morris plan banks, discount consumer financing, small loan companies and domestic building and loan associations." (Emphasis supplied)

5. F.S. 665.18 (1967) which provides:

> "The by-laws may also provide for fines or interest for nonpayment of dues, premiums or interest, which shall not exceed five cents per share for each weekly delinquency, or ten cents per share for each monthly delinquency. It is, however, unlawful for any association doing business in this state to charge or collect from any of its members, on any stocks or shares of stock therein, any money or moneys other than loan fees, dues on stock, premiums, interest and fines. All such fees, fines, premiums and interest shall be provided for in the by-laws, and shall be credited to earnings, out of which expenses and dividends shall be paid, *and no such charges or payments shall be deemed usurious*, even if in some cases exceeding the legal rate of interest, and the same may be collected by law as

> other debts of like amount are now collected in this state, or as provided by the by-laws." (Emphasis supplied)[3]

6. Amendment 14 (Sec. 1), United States Constitution:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

7. Article 6, United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

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[3]The building and loan association law has been substantially amended, effective June 2, 1969. The amendments, ruled the Florida Courts, are inapplicable here. The loan, found the Courts below, and the transaction here arose prior to the effective date of the new statutes. We contested this below, but for purposes of this petition, we may equally rely on the 1967 statutes as the Courts below did. Interestingly, effective June 2, 1969, F.S. 665.161 was continued in identical language, but was renumbered as F.S. 665.395. At the same time, F.S. 665.511 was enacted, effective that date. The new statute provides squarely and unequivocally that Federal loan and savings associations, like the petitioner here, are entitled to all exemptions — such as exemptions from the usury laws—that are now provided by the laws of this State for associations organized under the laws of this State.

E.

STATEMENT OF THE CASE

1. *Proceedings Below*

a. The respondent, as plaintiff in Dade County Circuit Court, instituted an action to recover as a forfeiture and penalty, the full interest it had paid to the petitioner in conjunction with an alleged construction loan. The theory of the action was usury in violation of Florida Statutes, Chapter 687 (R. 24-28, 32).

b. After a full trial, the trial judge, sitting without a jury, found that the loan was usurious, in that the interest charged in fact exceeded the statutory rate of 15%. Accordingly the trial court entered judgment for the plaintiff (the respondent here) in the total amount of $652,169.24 (A. 24-32; R. 325-332).

c. The defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, appealed to the Third District Court of Appeal. The judgment was modified, and reduced to the sum of $574,169.24. The Third District held that the fee paid to the petitioner for the underlying loan commitment was not interest, and thus deducted this amount from the award. In all other respects the judgment was affirmed. Petition for rehearing was made and denied (305 So.2d 59; A. 16-23).

d. The petitioner sought review in the Florida Supreme Court, obtained a writ, but then after argument, the Court discharged the writ, in a 4-3 decision, finding

no conflict jurisdiction under the Florida Constitution (Art. 5, §3; Fla. App. Rule 4.5(c)(6)). Rehearing was denied (A. 2-13). This petition follows.

2. *Violation of Fourteenth Amendment, Clearly Raised at Relevant Times Below from the Outset (U.S. Supreme Court Rule 23(f)); and Supremacy Clause Raised When Violation Apparent*

The petitioner, at all times, claimed that a construction of the Florida Statutes, which would exclude domestic savings and loan associations from the usury laws; but at the same time would not exempt federal savings and loan associations, would violate the Fourteenth Amendment "Equal Protection" Clause of the United States Constitution.

a. The petitioner (defendant) denied usury and urged at trial that the Florida Statutes exempted federal savings and loan associations as well as domestic; and that an interpretation which exempted only domestics and not federals would be unconstitutional under the Fourteenth Amendment (A. 43-44). The trial court held that the defendant, FINANCIAL FEDERAL SAVINGS & LOAN ASSOCIATION, INC. was not exempted from the usury acts (A.32).

b. Federal appealed to the Third District Court of Appeal challenging that ruling (A. 41-42).[4]

c. At page 7 of both its main and reply briefs, the appellant, (petitioner here) contended that an interpreta-

[4]See Florida Appellate Rule 3.5(c); see A. 41-42 claiming as error judicial act finding non-exemption of Financial Federal.

tion which would exempt domestic savings and loan associations but not federals was "constitutionally suspect" and "would surely have violated the Florida and the Federal Constitutions" (A. 40-41).

d. The Third District Court of Appeal, in any event, squarely held that a prior decision held that the usury exemption provided for by Fla.Stat. §661.161 applied only to domestic associations and not to foreign associations such as the defendant Financial Federal (A. 21). Thus, the Third District held flatly that the usury exemption statutes provided an exemption for domestic savings and loan associations, but not for foreign associations or federals.

e. Accordingly, on petition for rehearing, Financial Federal specifically pointed out that the Third District Court of Appeal overlooked serious and substantial constitutional issues and argued that:

> "Neither common sense nor the record suggests any possible reason for making usury depend solely on whether a savings and loan association received its charter from the state or federal government. Where no reason exists for separate treatment, the equal protection clause of both the Florida and the Federal Constitution is violated by such an arbitrary classification. cf. 45 Am. Jur.2d, Interest and Usury, §6; Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620." (A. 39).

The petition for rehearing was denied by the Third District Court of Appeal (A. 15).

f. Financial Federal then petitioned to the Florida Supreme Court for a writ of certiorari and urged—among the numerous claims of conflict of decisions, required under the Florida Constitution as a predicate to Florida Supreme Court jurisdiction (Fla. Const. Article 5, §3; Fla. App. Rule 4.5c(6)) — conflict with Florida decisions on the Fourteenth Amendment. Thus, violation of the Fourteenth Amendment, was raised to the extent possible. Florida cases, showing that statutes which discriminate in favor of local entities, persons or associations, and against foreign entities, persons, or associations, absent a rationale basis for the classification, violate the equal protection of the law clauses of the United States Constitution, Amendment Fourteen, (as well as the Florida Constitution, Art. 1 §2) were cited. Jurisdiction of the Florida Supreme Court was dependent upon a showing of conflict of the decision of the Third District Court of Appeal and prior Florida decisions. Financial Federal cited Florida cases construing the Federal Constitution, Amendment Fourteen, which held that residency — without more — or place of incorporation or charter cannot be and is not a legitimate basis, without more, for a discriminatory classification in a statute. An alleged difference between federal savings and loan associations and Florida savings and loan associations was dispelled (A. 37-38).

g. In the brief on jurisdiction, the very same contention was made; a conflict was asserted showing prior Florida decisions construing the Fourteenth Amendment (see footnote A. 36-37).

h. The Florida Supreme Court initially *granted* the writ of certiorari (A. 13). Then, the petitioner filed a brief on the merits, urging that the Third District Court of Appeal interpretation of the Florida Statutes was un-

constitutional under the Fourteenth Amendment and the Supremacy Clause.[5] On the merits, both Florida Supreme Court decisions and United States Supreme Court decisions were cited (A. 33-36). After oral argument on the merits, the Supreme Court of Florida discharged the writ, finding no jurisdiction, because, it held, the question of statutory construction and the Third District decision did not conflict with prior decisions in Florida. A dissenting opinion, (in a four to three decision) challenged the discriminatory interpretation of the usury exemption statutes (A. 3-12), under the *Supremacy Clause*, citing cases.

The Financial Federal Savings and Loan Association again filed a petition for rehearing and again urged and flatly contended that the unequal treatment afforded to this federal institution, having virtually the "identical powers" as domestic savings and loan associations rendered the statutes — as construed — unconstitutional, under both the 14th amendment and the Supremacy Clause (Article 6); insofar as it attempted to exclude federal savings and loan associations (A. 33). The petition for rehearing was denied (A. 2).

Thus, the Financial Federal Savings and Loan Association initially attempted to demonstrate that the usury exemption statutes of Florida clearly applied to federal savings and loan associations as well as domestic ones, under their clear wording, and under the edict that statutes should be construed to avoid constitutional problems where

[5]The petitioner, on the merits, was no longer restricted to showing a conflict with prior *Florida* decisions. So, the Supremacy Clause violation, as well as the 14th Amendment violation, now was asserted — in the Florida effort to regulate a federal institution in an arbitrary manner, *to the benefit* of competing state institutions. The Third District *held* that state institutions were exempted, but *not* federals.

possible. However, the trial court found that Financial Federal Savings & Loan Association was not exempted; and the Third District Court of Appeal found that the usury exemption statutes applied only to domestic associations and not foreign ones like Financial Federal. Financial Federal challenged any discriminatory interpretation of the statutes at all relevant points. Thus the point is squarely raised.

3. *Issues At Trial And Trial Record*

The litigation arose out of financing by the Federal of a 360 unit high-rise condominium built by plaintiff on Miami Beach known as Burleigh House. Initially, the parties negotiated for financing on the basis of 360 individual long term mortgage loans on the individual units of the building (Plaintiff's Exhibit 1). After objection by the Federal's lawyers[6] (T. 167-168), the financing concept was changed to a package deal providing both interim (construction) and permanent financing.

Under the package deal as ultimately structured by the parties, a maximum of $7,800,000 was to be loaned. During the initial construction period (eighteen months), security for the loan was to be the land and buildings in progress. Thereafter, a "rollover" was to occur under which the substituted security would become 360 individual twenty-five year mortgages executed by plaintiff on the individual units (Plaintiff's Exhibits 1, 8, 11, T. 169-171, 274).

[6]Mortgages could not be recorded on the individual units before they were built.

On January 6, 1969, the Federal issued a commitment which plaintiff accepted providing in pertinent part:

> "This letter will serve as a commitment by Miami Beach Federal Savings and Loan Association to consummate a commercial loan on the above described property, upon the terms and conditions contained in this letter.
>
> This commercial loan will be in the principal amount of $7,800,000.00, and will bear interest at the rate of 8½% per annum. The interest rate on the loan will be 8% per annum during the construction period, which will be a maximum period of 13 months from the date of the execution of the mortgage.
>
> This loan will be made up of 360 individual mortgage loans totaling the aggregate sum of $7,800,000.00. Of this sum, $7,000,000.00 will be placed in the Construction Escrow Fund and the remaining $800,000.00, will be held in reserve by the Association for use in closing and disbursing on the individual apartment loans." (Plaintiff's Exhibit 2).

Thereafter, a "closing" was held on February 26, 1969, at which plaintiff executed a mortgage note providing:

> "After date, for value received, the undersigned, jointly and severally promise to pay to the order of MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, the sum of SEVEN

> MILLION EIGHT HUNDRED THOUSAND and No/100 ($7,800,000.00) DOLLARS, together with interest as hereinafter stated, at the rate of Eight and Five Tenths (8.5%) Percent per annum, payable as follows:
>
> Interest only at the rate of Eight (8%) Percent per annum, shall be payable on the first day of each and every month hereafter, beginning March 1, 1969, and shall accrue from the date of the actual disbursement of funds, and shall be based on amounts actually disbursed from the construction fund. Interest at the rate of Eight and Five Tenths (8.5%) Percent per annum on $7,000,000.00, less any principal reductions, shall be payable on the first day of each and every month hereafter commencing April 1, 1970.
>
> The entire unpaid principal indebtedness shall be due and payable on September 1, 1970. . . ." (Plaintiff's Exhibit 8).

At the closing, the parties also agreed as follows:

> "This will confirm our agreement and understanding with regard to the items we discussed at the closing yesterday. At that time, you executed one note and mortgage in the amount of $7,800,000.00. After the Condominium Declaration has been placed of record, you will execute 360 individual mortgages on the 360 units of the Condominium which will be substituted for the one mortgage described above.

> Please be advised that there will be no additional costs to you for placing of record the 360 individual loans described above. All such costs will be borne by Miami Beach Federal Savings and Loan Association. . . ." (Plaintiff's Exhibit 11).

After the closing, plaintiff drew down construction funds and built its building. Then, effective September 1, 1970 when the eighteen month note matured, plaintiff executed 344 individual notes and mortgages (25 year permanent financing) on the individual units (16 units were sold for cash), which were substituted as security for the loan. These individual mortgages were then assumed by the condominium purchasers (R. 86). As agreed, the Federal[7] made no additional charges to plaintiff or the purchasers when the "rollover" and assumptions occurred (T. 81-86).

The Federal charged plaintiff a one point ($78,000) commitment fee and four more points ($312,000) as additional closing costs (Plaintiff's Exhibits 2, 9, 20). Out of $390,000 so received, the Federal paid over to others $66,812.00 for taxes, recording fees, and lawyers' fees (Plaintiff's Exhibit 20; R. 16). The trial court held that all of the remaining $328,188 retained by the Federal was "interest" within the meaning of F.S.A. Chapter 687 (R. 325-332). (The Third District correctly held that the commitment fee was not interest).

The trial court held, contrary to the position of Financial Federal, that: (1) the "construction loan" was a wholly separate and distinct loan from the long term financing; (2) that all closing costs other than the Federal's cash payments to others were deemed "interest"; and (3) that all of the "interest" should be spread over an 18 month construction loan period rather than the 26½ year period for construction and permanent financing; and (4) when such interest was so spread, the effective rate of interest exceeded 15%; (5) and that federal savings and loan associations were not exempted from the usury laws.

[7]Plaintiff, however, recaptured some $421,000 in "closing costs" from its purchasers (T. 88-91).

Financial Federal asserted among other things that the laws exempting savings and loan associations from the usury laws (under 1967 and 1969 statutes) applied to federals as well, and that a contrary application would be unconstitutional (A. 43-44) under the Fourteenth Amendment. It also contended in the trial court and in the Third District, that the "interest" should have been spread over the entire period of the construction and permanent financing and that this was intended — one basic agreement in two phases, and that when spread out over the entire period there would be no usury. Financial Federal also urged that the suit was not brought within the requisite Florida statute of limitations; and that one point commitment fee ($78,000) was not interest; nor was the balance of $312,000 interest at all (the trial court allowed Financial Federal to claim as closing costs only money it actually had paid to others in conjunction therewith (or $66,812). Moreover, in view of the "rollover" Financial Federal insisted that there was no usurious intent, as required by Florida law, in any event.

The trial court rejected all of these positions as we have seen. So did the Third District.

4. *Opinion Of Third District Court of Appeal*

The Third District Court of Appeal affirmed except it held on the merits that the $78,000 commitment fee was not interest. The bank continued to insist on its position; the Florida Statutes exempted savings and loan associations — including federal savings and loan associations, from usury; and that a contrary interpretation rendered the statutes constitutionally suspect or flatly unconstitutional. The Federal also urged that the "interest" should have been spread over 26½ years, and so viewed, would not violate the Florida Statutes against usury; that the claim was not brought within the applicable statute of limitations (F.S. 95.11(6)); that some $328,188.00 charged as closing costs, was not "interest"; and that in no event did Financial Federal intend to violate any usury statute.

The Third District Court of Appeal nevertheless affirmed the trial court, and forfeited all of the interest, except it did hold that $78,000 was not interest; and thus reduced the judgment — involving forfeiture of all interest — by that amount. As we have seen, the Third District Court of Appeal squarely held that Florida usury exemption statutes apply to domestic savings and loan associations, but not to federals.

5. *Supreme Court Decision*

The Supreme Court simply discharged the writ of certiorari, finding no conflict with Florida decisions (336 So.2d 1145). The majority decision did not address itself directly to the claim of conflict with Florida cases interpreting the Fourteenth Amendment. The dissent argued that jurisdiction existed, and challenged the constitutional-

ity of an interpretation of the Florida Statutes exempting savings and loan associations from usury, so as to exclude federal savings and loan associations. The constitutional issues were, of course, re-raised on rehearing in the Supreme Court. No jurisdictional direct conflict was found and the Supreme Court of Florida refused to exercise jurisdiction. Thus, the writ is addressed to the decision of the Third District Court of Appeal.

F.

REASONS FOR GRANTING THE WRIT

FLORIDA STATUTES, EXEMPTING SAVINGS AND LOAN ASSOCIATIONS FROM FLORIDA USURY LAWS, ARE UNCONSTITUTIONAL AS CONSTRUED BY THE THIRD DISTRICT COURT OF APPEAL, INSOFAR AS THEY HAVE BEEN HELD TO EXEMPT ONLY FLORIDA SAVINGS AND LOAN ASSOCIATIONS BUT AT THE SAME TIME TO SUBJECT FEDERAL SAVINGS AND LOAN ASSOCIATIONS WITH SUBSTANTIALLY THE SAME POWERS TO THE USURY LAWS; VIOLATION OF FOURTEENTH AMENDMENT AND, OR ARTICLE 6 EXISTS; FEDERAL SAVINGS AND LOAN ASSOCIATIONS MUST BE INCLUDED WITHIN THE AMBIT OF USURY EXEMPTION STATUTES IF DOMESTICS ARE SO INCLUDED, AS THEY HAVE BEEN HELD TO BE, BY FLORIDA COURTS.

We believe that the Florida Statutes exempting savings and loan associations from the usury laws were con-

strued by the Third District Court of Appeal in an unconstitutional manner and fashion. The Third District Court of Appeal held that domestic savings and loan associations were exempt. The statutes clearly indicate that they indeed were exempt — but also indicate that foreign federal savings and loan associations (and particularly federal savings and loan associations) likewise were exempt.

There is no substantial difference between the Financial Federal Savings and Loan Association — chartered by the United States; and local savings and loan associations.

Financial Federal was a foreign "building and loan association" as that term is used in Ch. 665 (1967). F.S. 665.01. The Federal, under F.S. 665.01, as it existed here, most assuredly was incorporated pursuant to a law providing for the incorporation of building, loan fund and saving associations; and further was indeed incorporated for the purpose of "accumulating" funds for use and benefit of its members. As a matter of fact, it specifically was and had to be incorporated under a law "providing for the incorporation of building, loan fund and savings associations" (see, 12 U.S.C.A. §1464; compare 665.01 (1967)). And loans to nonmembers (quite similarly regulated as to required security), are authorized by both state law 665.21(5)); and Federal law, §1464(c), to "accumulate" funds for the use and benefit of members; and authorization to make such loans does *not* destroy the status of the association as a "building and loan" association.

The primary purpose of these associations, Federal and domestic, is to provide for accumulation of funds, to be made available to homeowners or home builders; and for

savers for their financial benefit. Loans to nonmembers clearly are not inconsistent with such purposes, and are allowable by law under both schemes. And because of the desirable purposes of such associations, the Florida legislature has seen fit to exempt loans made by savings and loan associations from its usury laws. *Federal law imposes no usury penalty on federal associations.*

The respondent has claimed that other statutes, read with 665.161, somehow indicate an intent to *exclude* federals from the exemption. It is urged that if the associations were regarded as similar, there would have been no reason to provide for "conversion" of domestics into Federals. F.S. 665.36 (1967). (See Laws, 1935, C. 16843 §1). As a matter of fact, ease of conversion into federals without interruption, F.S. 665.40, reflects the similarity that the legislature attributed to the two associations. (Federal Law contains a reciprocal provision; 12 U.S.C.A. §1464(i). The statute, in Florida, enacted in 1935, had an obvious purpose; to enable transfer of administration and examination duties and expenses from the Comptroller to the Federal Home Loan Bank Board.

The 1967 version of Florida's Building and Loan Association law shows *many* equations of domestics to federals. (See F.S. 665.35-665.40; see also, F.S. 665.43-665.48; 665.51).[8]

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[8]Not the least of these is F.S. 665.40, which allows for uninterrupted conversion of a domestic to a federal and further provides:

"Federal Savings and loan associations and stockholders therein shall be entitled to the *same exemptions* from taxation *or otherwise* that are now provided by law for Florida building and loan associations and all laws now existing, providing any such exemptions

(Footnotes continued on next page.)

And, of course, Federal Savings and Loan Associations do provide for shares and stock (12 U.S.C.A.1464(a), (b)(1); (g); (j); and the Federal Home Loan Bank Board does regulate the amount that all Federally insured associations (State or Federal) may pay in interest, or dividends to savers; and Federal law carefully regulates mortgage loans to other than actual savers (§1464(c) — much like Florida law (F.S. 665.21(5) (1967)).

The differences between the two (domestic and federal), in 1967 and now, have no relation to a legitimate reason for exempting domestics, to the detriment of federals. The equal protection mandate of the Federal Constitution forbids the construction of the Florida Courts below.

Under the Florida statutes recited, supra, clearly federal savings and loan associations like Financial Federal must be exempted from the usury laws to the same extent as are domestics (already held to be exempted by the statutes). Any other interpretation under the statute is unconstitutional, for unfair and unequal discrimination.

a) A statute which discriminates in favor of local entities, persons or associations, and against foreign entities,

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(Footnotes continued from preceeding page.)

are hereby made applicable to federal savings and loan associations and stockholders therein."

Clearly, when read in conjunction with F.S. 665.161 (1967), the clear words of the Florida Statutes seem to provide the usury exemption to federals. The words "taxation or otherwise" *do not* relate only to taxation exemptions and other somewhat related exemptions arbitrarily mentioned by respondent and the court below (see e.g. 665.10, 665.14, 665.31; 665.10 (1967) (charter fees; capital stock tax, examination fees).

persons or associations, where there is no rational basis for the classification; or no substantial or compelling reason therefor, violates the equal protection of the law clause of the United States Constitution, Amendment 14.

The result here would be the same under either the "strict scrutiny" test, which imposes a heavy burden on the state to show a "substantial and compelling" reason for the classification [where certain fundamental rights render the classification constitutionally suspect] *Dunn v. Blumstein*, 405 U.S. 330 (1970) (striking down an excessive "durational residence" requirement for voters); or the less stringent "rationale basis" test for statutory classifications, which requires that a discrimination, preferring one business entity over another, must be based on differences that are "reasonably related" to the purposes of the Act in which it is found. *Morey v. Doud*, 354 U.S. 457 (1957).

Under either test, residency — without more — or place of incorporation or charter of entities with virtually identical powers, is not a legitimate basis for a discriminatory classification in a statute; *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927); *Shapiro v. Thompson*, 394 U.S. 618 (1969); DUNN, supra.

Certainly a desire to favor a state savings and loan institution over a federal one does not suffice; see, for example, *Morey v. Doud*, 354 U.S. 457 (1957); *Dukes v. City of New Orleans*, 5 Cir. 1974, 501 F.2d 706.

b) A federal savings and loan association, of course, is a "building and loan association" under F.S. 665.01. The terms are synonymous (see 12 U.S.C. 1424(a) and 1724(a)-

1730). (See also, present F.S. 665.511). Such associations *are regulated* by the Federal Home Loan Bank Board, pursuant to federal statute (12 U.S.C. 1437 (b)); 1464(a), commonly known as Home Owners' Loan Act of 1933, "H.O.L.A.", as amended, see § 5(a).

An effort by the Florida Legislature to favor a domestic association *to the detriment* of a federal one, by exempting domestics from usury laws, but not federals, and thus to *regulate* the federal institution in such a discriminatory manner, is unconstitutional. (Amendment 14; and Article 6; U.S. Const., Supremacy Clause). A state may not discriminate by legislation against a federal institution, or against an entity operating under federal auspices or license in such a manner. See *Dukes v. City of New Orleans, supra, Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 751 (1961); *Phillips Chem. Co. v. Dumas Indep. School District*, 361 U.S. 376 (1960); *Perez v. Campbell*, 402 U.S. 637, 648, 650 (1971).

c) A state cannot by legislation create a dual standard under which a loan made by a federal association is treated differently from the same loan made by a substantially identical state chartered institution, to the detriment of the federal institution on the sole rationale that they have been chartered by different authorities. See, *U. S. v. State Tax Commission*, 1 Cir.1973, 481 F.2d 963, 967-970.

d) The Respondent's argument below was that domestic associations were entitled to special treatment because they could only make loans to members. The "loans to members only" requirement appears to have been eliminated long prior to the time the instant case arose (see, F.S. 665.21(5) (1967)); and the argument is inaccurate

and has nothing to do with the unreasonable classification here anyhow. Both institutions presently are treated the same (F.S. 665.511), which illustrates further lack of recognition of any rational basis for classification.

f) Where a state statute clearly attempts to encompass and protect a certain class, it may not constitutionally exclude, or be interpreted to exclude, persons or entities, who fall within the clear ambit of the statute, for some artificial, discriminatory and arbitrary reason. Such persons or entities must be deemed to fall within the ambit of the statute. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guaranty and Liability Ins. Co.*, 391 U.S. 73 (1968); *Weber v. Aetna Gas Co.*, 406 U.S. 164 (1974). Here, Financial Federal of necessity falls within the ambit of the statute exempting savings and loan associations from the Florida usury laws.

Of course, under Florida's new statutory scheme, as we have seen, effective June 2, 1969, federal savings and loan associations clearly are exempt.[9]

---

[9]Burleigh House did not satisfy the prior mortgages and the loan was not finally consummated until September of 1969 (Defendant's Exhibits JJ and FF). Plaintiff borrowed its first monies on September 11, 1969, when it made its first draws from the construction fund (R. 17, Plaintiff's Exhibit 20) and paid interest thereon (R. 18, Plaintiff's Exhibit 20). Moreover, the $312,000 additional closing costs were not paid until these draws were made on the September 11th date (R. 17, Plaintiff's Exhibit 20). Prior to June 2, 1969, the plaintiff had paid the one point ($78,000) commitment fee which, as discussed infra, is not "interest". No money had been yet loaned since the loan itself had not been finally consummated. Moreover, the $312,000 additional closing costs were not even owed at that time since they were not payable if the deal fell through. If, as the lower courts apparently held, the law regarding federal exemption changed on June 2, 1969, there is no predicate whatsoever for the further holding below that plaintiff acquired $652,169.24 worth of vested rights prior to that date.

The unconstitutionality of the statutes as interpreted by the Third District Court of Appeal to exclude federals, and the merits, walk hand in hand here. For the decision of the Third District Court of Appeals is wrong for many reasons. Had the parties been able to carry out their original concept of 360 long-term loans, this case would never have arisen. The mere fact that a rollover had to be used so a valid mortgage would exist during construction should not entitle plaintiff (respondent) to free financing of its whole project; nor should procedural difficulties with which the parties became embroiled imply a showing that such a result was concocted by the Federal as part of a corrupt scheme or device to evade the usury laws from which local savings and loan associations are exempted, to the detriment, as the Florida courts apparently have held, of highly competitive, similarly situated federal institutions. Most respectfully there is no way that the judgment of the Third District Court of Appeal should be permitted to stand; in the light of the clear-cut Florida statutes exempting savings and loan associations — which constitutionally must include federal savings and loan associations, where, as here, they have been held to exclude domestics.

The Third District Court of Appeal undoubtedly has decided a federal question, or a matter arising under the constitution of the United States, in a way probably not in accord with applicable decisions of this Court—to say the least (Supreme Court Rules 19(1)(a)). A right under the United States Constitution has been asserted; statutes have been construed so as to exclude a party rightfully includable in them under the constitution. The petition should be granted.

G.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision and judgment of the Third District Court of Appeal of Florida should be quashed and reversed with directions to the trial court to enter judgment for the petitioner. Certainly, most respectfully, this court should review the matter. The Third District Court of Appeal has passed upon an issue of U.S. constitutional law and has construed a statute in direct contravention of the Fourteenth Amendment and Article 6. Accordingly, under Rule 19a of the Rules of this Court, certiorari review is indicated because the Third District Court of Appeal of Florida has most assuredly decided the case in a way that is not in probable accord with decisions of this Court. Review is warranted in this important area of constitutional law.

Respectfully submitted,

SAM DANIELS, ESQ.
1414 duPont Building
Miami, Florida
and
RODHURST, ORSECK &
PARKS, P.A.
25 W. Flagler Street
Miami, Florida 33130

Attorneys for Petitioner

BY_____
ROBERT ORSECK

H.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Petition for a Writ of Certiorari and Appendix have been mailed this ____ day of November, 1976 to: LAPIDUS & HOLLANDER, Attorneys for Respondent, Suite 2222, First Federal Building, One S.E. Third Avenue, Miami, Florida 33131, in accordance with Rule 33 of this Court.

BY_____
ROBERT ORSECK

APPENDIX

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1976
FRIDAY, OCTOBER 8, 1976

CASE NO. 73-1195

FINANCIAL FEDERAL SAVINGS AND
LOAN ASSOCIATION,

Appellant,

vs.

BURLEIGH HOUSE, INC.,

Appellee.

Upon motion of appellant for a stay of all proceedings it is ordered that said motion is granted and all proceedings in this cause in this court and the trial court are hereby stayed for a period of thirty (30) days conditional that the petition for Writ of Certiorari be filed in the U.S. Supreme Court within the thirty (30) days.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
THURSDAY, SEPTEMBER 30, 1976

CASE NO. 46,797

FINANCIAL FEDERAL SAVINGS AND
LOAN ASSOCIATION,

Petitioner,

vs.

BURLEIGH HOUSE, INC.,

Respondent.

On consideration of the Petition for Rehearing filed by attorneys for petitioner and Reply thereto,

IT IS ORDERED that said petition is denied.

ROBERTS, ADKINS, BOYD, ENGLAND, SUNDBERG, AND HATCHETT, JJ., CONCUR
OVERTON, C.J., DISSENTS

APPENDIX C

(Reported at 336 So.2d 1145)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1976

CASE NO. 46,797

DCA CASE NO. 73-1195
FINANCIAL FEDERAL SAVINGS AND
LOAN ASSOCIATION,

Petitioner,

v.

BURLEIGH HOUSE, INC.,

Respondent.

Opinion filed July 21, 1976

Writ of Certiorari to the District Court of Appeal, Third District

Robert Orseck of Podhurst, Orseck and Parks; and Sam Daniels, for Petitioner
Richard L. Lapidus of Lapidus and Hollander,
for Respondent

ADKINS, J.

Certiorari was granted in this cause to review the decision of the District Court of Appeal, Third District (305 So.2d 59) on grounds of direct conflict with a prior decision of this Court. It now appears that the writ was improvidently issued.

Relying upon Pinkerton-Hays Lumber Company v. Pope, 127 So.2d 441 (Fla. 1961), petitioner contends that the District Court of Appeal attributed to Spinney v. Winter Park Bldg. & Loan Ass'n, 162 So. 899 (Fla. 1935) a patently erroneous and unfounded principle of law. This is petitioner's strongest ground for jurisdiction.

Pinkerton-Hays Lumber Company v. Pope, supra, does not suggest that we take jurisdiction because we disagree with the result of the District Court of Appeal's decision. In this case we said:

> "For a District Court of Appeal to accept a decision of this court as controling [sic] precedent, and then to attribute to that decision a patently erroneous and unfounded principal [sic] of law, is to create a 'real and embarrassing conflict of opinion and authority' as that phrase was used in the case of Ansin v. Thurston, Fla., 101 So.2d 808, 811. It was to resolve conflicts in cases such as this that Article V, Section 4 of the Constitution granted to this court jurisdiction to review by certiorari decisions of the district courts of appeal." 127 So.2d at 443.

Spinney v. Winter Park Bldg. & Loan Ass'n, supra, held that the exemptions prescribed in Section 6192, C. G. L. (1927), later Fla. Stat. §665.161, F.S.A. (1967), is applicable to a state building and loan association, saying:

> "The reason behind this legislative enactment is sound.
>
> "A building and loan association is a sort of mutual benefit association. Each of the stockholders are assumed also to be borrowers. . . .
>
> "[T]he association may either make loans to its members who shall bid the highest premiums for priority or the association may enter into an agreement in writing for the given premiums to be paid by the borrower, in addition to the interest, which premium may be payable all at one time or in installments. . . .
>
> "And so it is that one subscribes for stock for the very purpose of being eligible to become a borrower from the fund which he helps to create by the payment of his stock subscription. The stockholder of the building and loan association is recipient pro tanto of such benefits as may accrue from the contract which he executes with the association as well as from the contracts which all other stockholders execute with the association. This being true, the Legislature has lifted the ban of usury to such an extent as to allow the stockholders to contract more liberally between themselves and within the organization than could lawfully be accomplished otherwise." (Emphasis supplied.) 162 So. at 903.

In considering jurisdiction under the principles enunciated in Pinkerton-Hays Lumber Company v. Pope, supra, we should first determine whether the District Court of

Appeal in the instant case (Financial Fed. Sav. & Loan Ass'n v. Burleigh House, Inc., 305 So.2d 59 (Fla.App.3d 1974)) accepted the Spinney case as controlling precedent. The District Court of Appeal in its opinion made the following reference to Spinney:

> "Financial Federal further argues hereinunder that if it cannot rely on the legislative changes effective June 2, 1969, then it is exempt from the usury penalties by virtue of Fla. Stat. §§665.161 and 665.40. We cannot agree.
>
> "In Spinney v. Winter Park Building and Loan Association, 120 Fla. 453, 162 So. 899 (1935) the Florida Supreme Court flatly held that the usury exemption provided for by Fla. Stat. §665.161 applies only to domestic associations and not to foreign associations such as the defendant Financial Federal. Fla. Stat. §665.40 entitles Federal savings and loan associations to the same exemptions from taxation as provided by law for domestic associations, not from the usury statutes. Therefore, we conclude that the defendant in the case sub judice is not exempt from the usury statutes." 305 So.2d at 62.

The court plainly said Spinney was not a controlling precedent for petitioner herein because the opinions related solely to domestic associations. Considering the reasoning of the court in Spinney as quoted above, it is apparent that petitioner herein could not have used the prior case as precedent for its position on appeal. This was all the appellate court held. The District Court of Appeal in the instant case reasoned that Fla. Stat. §665.40, F.S.A., specifically in-

cluded federal savings and loan associations in the exemption from taxation provided for domestic associations. Having drawn this distinction on tax exemptions, the District Court of Appeal held that petitioner herein was not exempt from the usury statute. This was a matter of statutory construction and a case of first impression.

The District Court of Appeal in the instant case did not attribute to Spinney "a patently erroneous and unfounded principle of law." Nor was there any "real and embarrassing conflict of opinion and authority." In the absence of "real and embarrassing conflict," we will not extend our jurisdiction to the point of substituting our judgment on a question of law for the judgment of a District Court of Appeal having final appellate jurisdiction.

The writ of certiorari is discharged.

It is so ordered.

ROBERTS, BOYD and HATCHETT, JJ., Concur
ENGLAND, J., Dissents with an opinion
OVERTON, C.J. and SUNDBERG, J., Dissent and concur with ENGLAND, J.
ENGLAND, J., dissenting.

I respectfully dissent. Under the doctrine announed in Pinkerton-Hays Lumber Co. v. Pope, 127 So.2d 441 (Fla. 1961), there is a real and embarrassing direct conflict between the decision below and our decision in Spinney v. Winter Park Bldg. & Loan Ass'n., 120 Fla. 453, 162 So. 899 (1935). As a result, we have jurisdiction for review under Article V, Section 3(b)(3) of the Florida Constitution.

The point of law in this case is whether a federal savings and loan association is exempt from Florida's usury statutes. In Spinney we held that a statutory exemption applies to domestic associations, but we did not discuss the status of foreign (including federal) associations. Nonetheless, the district court below attributed to that decision a determination that the exemption is not available to non-domestic associations.[1] Building on the lack of exemption ascribed to Spinney, and brushing aside a tax exemption statute as inapplicable to usury law questions, the district court "therefore" concluded that Financial Federal was not exempt from the usury laws. If the district court did not rely on Spinney as a controlling precedent (as the majority suggests), I fail to discern from its opinion any rational basis on which it resolved the usury exemption issue against Financial Federal.

In my opinion, the district court erroneously attributed a legal conclusion to Spinney which was not at issue there or discussed in the opinion, and then the district court relied on that principle of law as controlling for the precise issue before it. Under these circumstances, I believe that Pinkerton-Hays Lumber demands that we exercise our jurisdiction to set matters straight.

As I would reach the merits of this case, I take this occasion to express my views on them. The essential facts concerning financial arrangements between Burleigh House and Financial Federal, as set out in the district court's opinion, are not important to the legal issue. The question we have for determination is whether non-domestic associ-

[1]The district court states that "the Florida Supreme Court flatly held that the usury exemption provided for by Fla.Stat. §665.161 applies only to domestic associations and not to foreign associations. . . ." 305 So.2d at 62.

ations were exempt from Florida's usury statute in early 1969.[2] The specific statutes which command our attention are Sections 665.01, 665.161, and 665.18, Florida Statutes (1967).

Section 665.01 defines the term "building and loan association" to include both domestic and foreign savings and loan associations. Sections 665.161 and 665.18 appear to create exemptions from the usury laws for all such associations, the former broadly and the latter more restrictively for non-payment penalties provided for in an association's by-laws. We are asked to determine whether the exemptions are as broad as they appear to be, and why the Legislature created two exemptions in the same regulatory code.

Burleigh House essentially argues from the evolution of the statutory exemptions that the first exemption applies only to foreign associations, and as to those it is available only for associations which limit their loans to members. Since federal associations are not so restricted,[3] Burleigh House says that the usury laws apply. This argument traces the Legislature's original intention of exempting only thrift institutions whose internal structures served as a check on the interest rates which could be charged to members, and shows that this intent has not been altered by subsequent statutory amendments.

[2]Chapter 69-39, Laws of Florida, substantially revised the statutes involved in this proceeding. Under Section 665.53, Fla.Stat. (1969), none of the changes were given retroactive effect. The district court held, and both parties now concede for purposes of review, that this controversy is governed by prior law rather than any statutes which became effective on June 2, 1969.

[3]12 U.S.C. §1464(b)(2)(c)(1969).

Financial Federal contends that the resolution of this dispute can be ascertained from the plain language of the statutes involved, which purport to exempt all savings and loan associations, and from the logic of the proposition that the complicated provisions of Chapter 665 were not enacted to regulate the few existing financial institutions which in recent times have operated on the pure building society plan as it was known at the turn of the century. Since we are most apt to ascertain a correct understanding of the 1967 statutes by a reconciliation of logic, language and history, I would begin my analysis with the pertinent legislative history.

From 1893 to 1963, foreign "building and loan associations" were governed by a statutory scheme separate from that which regulated domestic associations. Domestic associations were then exempt from usury laws under a provision in the usury statute available to loans made in compliance with all provisions of the domestic code.[4] Foreign associations were then exempt under a provision in the foreign association regulatory code.[5] The term "building and loan association" as applied to foreign institutions, however, was limited to those doing "business on the building society plan, viz., loaning its funds to its members only."[6] The general usury exemption for domestic associa-

[4]Chapter 4022, §2, Laws of Florida (1891), providing that "loans made by building and loan and other mutual benefit associations, to its members, when made and conducted under the provisions of Chapter 3709, Laws of Florida, approved May 31, 1887, and acts amendatory thereof and such other acts as may hereafter be passed . . . shall not be considered usurious . . . . " See Section 687.031, Fla.Stat. (1961).

[5]Chapter 4158, §8, Laws of Florida (1893), carried forward as Section 668.09, Fla.Stat. (1961).

[6]Chapter 4158, §4, Laws of Florida (1893), carried forward as Section 668.05, Fla.Stat. (1961). In Skinner v. Southern Home Bldg. & Loan Ass'n, 46 Fla. 547, 35 So. 67 (1903), we held that foreign

tions was repealed in 1909,[7] but re-appeared in 1915 as a provision of the domestic association code.[8] This was the provision which was considered in Spinney, and which in 1967 appeared as Section 665.18.

In 1963 the chapter regulating foreign associations was repealed, except for two provisions which were merged into the domestic association code, Chapter 665.[9] One of these was the usury exemption, which was transferred to Chapter 665 and renumbered as Section 665.161. The definition of foreign associations which had limited their loans to members, former Section 668.05, was not one of the two transferred.

It seems to me apparent that in 1963 the Legislature intended to eliminate an outdated system of dual regulation and endeavored to erect a single, integrated regulatory structure for both domestic and foreign thrift institutions. This would lead me to conclude that the reference to "any" association in the code's general usury exemption, Section 665.161, means precisely that, despite its origin as a limited exemption for foreign associations loaning funds to their members.

The question Burleigh House poses is why anyone should ascribe a different meaning to this exemption as of 1963 than the same language had before that time, considering that the domestic exemption was retained in its same

associations were subject to the further restriction, which then pertained to domestic associations, that loans be made on the basis of competitive bidding for no more than the value of a member's share.

[7]Chapter 5960, §2, Laws of Florida (1909).

[8]Chapter 6971, §8, Laws of Florida (1915). This exemption was retained during the general revisions of the domestic building and loan association code in 1925 and 1927.

[9]Chapter 63-318, Laws of Florida.

form as well. My answer is that there is no purpose to be served by ascribing to the present regulatory scheme a set of historical connotations which, while once significant, have virtually disappeared,[10] and that an explanation for the dual exemptions is readily apparent. Given the variant history of the foreign and domestic usury exemptions, the Legislature may well have concluded that a repeal of the foreign exemption (Section 668.09) would be viewed as an elimination of the foreign association exemption instead of a matter of regulatory simplification. The Legislature may also have viewed the limited exemption in Section 665.18 for by-law penalties as too restrictive for modern domestic savings institutions.

I conclude, therefore, that under the 1967 statutes, the usury exemptions contained in Sections 665.161 and 665.18 applied with equal force to domestic and foreign savings and loan institutions. This conclusion is consistent with the obligation of courts to view apparent legislative inconsistencies in a manner which will avoid questions of constitutionality. The district court's decision that domestic associations were exempt from the usury laws while foreign institutions with virtually identical powers were not, raises a serious question of whether the statutes creating the distinction are constitutional under the supremacy clause of the Federal constitution.[11]

For these reasons, I would reverse the decision of the district court.

OVERTON, C.J. and SUNDBERG, J., Concur

---

[10]I note that federal savings and loan associations did not come into existence until 1933.

[11]See Michigan National Bank v. Michigan, 305 U.S. 467 (1961); United States v. Massachusetts Tax Comm'n., 481 F.2d 963 (1st Cir. 1973).

APPENDIX D

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1975
FRIDAY, NOVEMBER 7, 1975

CASE NO. 46-797

FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

BURLEIGH HOUSE, INC.,

Respondent.

WRIT OF CERTIORARI

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Third District of Florida, is granted and the cause is hereby set down for oral argument at 9:30 o'clock a.m. THURSDAY, JANUARY 8, 1976. A maximum of 20 minutes to the side is allowed but counsel is expected to use only so much of that time as is necessary.

Either side may waive oral argument. If both sides waive oral argument the case will be promptly assigned for decision and the cause expedited.

The Court has tentatively accepted jurisdiction of this case; however, the parties should be prepared to argue the jurisdictional issue should the question be raised by the Court.

The time for filing briefs on the merits is set forth in Rule 4.5c (6), F.A.R. Please file an original and two copies of all briefs. UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL ARGUMENT WILL BE FORFEITED.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

ADKINS, C.J., ROBERTS, BOYD and OVERTON, JJ., concur

ENGLAND J., would grant without argument

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1974

THURSDAY, JANUARY 9, 1975

CASE NO. 73-1195

FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

BURLEIGH HOUSE, INC.,

Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

APPENDIX F

OPINION AND DECISION OF THIRD DISTRICT COURT OF APPEAL, DATED NOV. 12, 1974
(305 So.2d 59)

FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

BURLEIGH HOUSE, INC.,

Appellee.

No. 73-1195.

District Court of Appeal of Florida,
Third District.

Nov. 12, 1974.

Rehearing Denied Jan. 9, 1975.

HAVERFIELD, Judge.

Defendant-appellant seeks review of an adverse final judgment awarding plaintiff-appellee $652,169.24 plus costs in this usury action.

In 1968, plaintiff-appellee, Burleigh House, Inc., the developer of a 360 unit highrise condominium building on Miami Beach, Florida was approached by the defendant-appellant, Financial Federal Savings and Loan Association

(hereinafter referred to as Financial Federal), which offered both construction and permanent financing for the project. Initially the parties attempted to negotiate a single loan for both the construction and permanent financing of the building. However, this scheme presented recording and other difficulties and at the request of defendant Financial Federal, plaintiff applied for a construction loan in the total principal sum of $7,800,000 and deposited a stand-by fee of $39,000. On January 6, 1969 Financial Federal issued its commitment letter to consummate a loan in the principal amount of $7,800 000 at an interest rate of 8½% per annum, 8% per annum during the construction period which originally covered a maximum period of 13 months from the date of execution of the mortgage. The letter further provided that the loan was to be made up of 360 individual mortgage loans totaling the aggregate sum of $7,800,000. Of this sum, $7,000,000 would be placed in a construction escrow fund and the remaining $800,000 would be held in reserve by Financial Federal for use in closing and disbursing on the individual condominium mortgage loans which would be assumed by qualified purchasers. Plaintiff signed the commitment letter and paid an additional $39,000 stand-by fee therefor. Prior to closing, plaintiff on February 18, 1969 sent to defendant Financial Federal a letter wherein it requested an extension of the construction period from 13 to 18 months. At the closing on February 26, 1969 plaintiff signed a mortgage and note which was prepared by defendant Financial Federal and which provided that plaintiff promised to pay Financial Federal $7,800,000 for an 18 month construction loan with the entire unpaid principal due and payable on September 1, 1970. The interest thereon was 8% per annum for the first 13 months beginning March 1, 1969, 8.5% per annum thereafter until September 1, 1970. Defendant Financial

Federal also prepared on February 26, 1969 a construction loan agreement between itself, plaintiff, as owner, and the general contractor. This agreement reflected the construction of the building would take 18 months at an estimated sum of $7,000,000 which would be disbursed as the construction proceeded. Financial Federal charged plaintiff $390,000 as closing costs on the loan.

Construction commenced in April, 1969 and was still in progress on April 1, 1970. Nevertheless, over plaintiff's protests and despite the fact that as of April 1, 1970 less than half the funds were drawn out of the construction account, Financial Federal began charging the full interest on the $7,000,000. Effective September 1, 1970 when the 18 month note matured, plaintiff then executed 344[1] individual notes and mortgages for a term of 25 years for the permanent financing on the individual units. These mortgages were then assumed by the condominium purchasers. Plaintiff made the last payment of interest on the construction loan on September 30, 1970 and the construction mortgage was satisfied in December 1970. On September 25, 1972 plaintiff filed against the defendant Financial Federal a complaint seeking damages for usury wherein it alleged that Financial Federal had retained control over most of the $7,000,000 construction fund from which it had drawn only approximately $2,000,000 by April 1, 1970; nevertheless, Financial Federal charged plaintiff interest on the entire $7,000,000 resulting in an effective rate of interest in excess of 15% per annum. In response thereto, Financial Federal raised as a defense the Statute of Limitations and at trial contended that the 18 month construction loan and subsequent permanent mortgages in effect

[1]16 of the units were sold for cash.

were one loan and, therefore, the $390,000 closing costs paid by the plaintiff should be spread over a 26½ year period.[2] The cause proceeded to a non-jury trial at the conclusion of which the trial judge found inter alia: (1) that time as well as amount of principal is a factor in the calculation of interest and the retention of a substantial portion of a loan without a corresponding abatement of interest on the amount retained has the effect of substantially increasing the per centum of interest (Williamson v. Clark, Fla.App. 1960, 120 So.2d 637); (2) that Financial Federal over plaintiff's objections continued to allow interest to run on the undisbursed portion of the loan; (3) that the effective rate of interest on the 18 month construction loan was in excess of 15% and accountants for both parties so testified; (4) that defendant's actual expenses in closing were $66,812 and the balance of the $390,000 charged as closing costs actually was interest; (5) that the construction loan and the permanent mortgages were separate and distinct loans and the closing costs clearly, by agreement of the parties, were charges for the construction loan alone; (6) that plaintiff's suit was filed within the applicable two year Statute of Limitations period; and (7) that defendant was not exempt from Florida's usury laws. Thereupon, the trial judge entered judgment in favor of plaintiff in the sum of $652,169.24 plus costs. Defendant Financial Federal Appeals therefrom.

We first turned our attention to appellant's argument that the trial court erred in holding that the instant action was brought within the two year period of the applicable Statute of Limitations.

[2]18 month construction period plus the 25 year permanent financing period.

[1, 2] A borrower at a usurious interest is given a cause of action for the imposition of a penalty or forfeiture upon the occurrence of a payment, and it is from the date of such a payment the Statute of Limitations begins to run. Wenck v. Insurance Agents Finance Corp., Fla.App. 1958, 99 So.2d 883; Vance v. Florida Reduction Corporation, Fla. App. 1972, 263 So.2d 585. The trial judge found that plaintiff-appellee by check dated September 28, 1970 and received on September 30, 1970 made the last interest payment on the subject construction loan. The record contains sufficient competent evidence in support thereof and, therefore, we agree with the trial court that the instant suit being commenced on September 25, 1972 was prior to the time of the running of the Statute of Limitations, §95.11 (6) Fla.Stat., F.S.A.

We next considered appellant's contention that the trial court erred in holding that at all times here material, Financial Federal Savings and Loan Association was not exempt from the usury penalties contained in the Florida Statutes, Chapter 687.

Hereunder, we find it necessary first to dispose of Financial Federal's argument that provisions of the new Savings Association Act [Fla.Stat. § 665.011 et seq.] effective June 2, 1969 are applicable to the instant suit.

[3] The uncontradicted record shows that the subject mortgage and note were executed by the parties on February 26, 1969 and prior thereto, plaintiff had paid a $78,000 (one point) commitment fee. In addition, the record further reflects[3] that Financial Federal on May 4, 1969 and on June 2, 1969 had posted payments of interest of

[3]Contrary to defendant's contention that prior to June 2, 1969 no interest had been paid by plaintiff.

$214.56 and $104.01 respectively which were received from the plaintiff. The new Savings and Loan Act became effective on June 2, 1969 and Fla.Stat. § 665.53, F.S.A. grandfathered rights accruing, accrued or acquired prior to the effective date thereof. Thus, we hold that the case at bar is governed by the former Chapter 665, Fla.Stats. §§ 665.01 to 665.52.

Financial Federal further argues hereinunder that if it cannot rely on the legislative changes effective June 2, 1969, then it is exempt from the usury penalties by virtue of Fla.Stat. §§665.161 and 665.40. We cannot agree.

[4] In Spinney v. Winter Park Building and Loan Association, 120 Fla. 453, 162 So. 899 (1935) the Florida Supreme Court flatly held that the usury exemption provided for by Fla.Stat. § 665.161 applies only to domestic associations and not to foreign associations such as the defendant Financial Federal. Fla.Stat. § 665.40 entitles Federal savings and loan associations to the same exemptions from taxation as provided by law for domestic associations, not from the usury statutes. Therefore, we conclude that the defendant in the case sub judice is not exempt from the usury statutes.

[5] Defendant-appellant also alleges as error the trial court's holding that all costs deemed interest should only be computed over an eighteen month period.

The mortgage note of February 26, 1969 by its provisions clearly reflects that the term of the subject loan was 18 months and that the entire unpaid principal indebtedness would be due and payable on September 1, 1970. It is also apparent from an examination of the record that on February 26, 1970 the date of the closing, there was no

definite agreement between the parties with respect to the permanent financing. Thus, this argument of appellant must fail as the record contains substantial competent evidence to support the finding of the trial judge that there were two separate and distinct loans — one for the construction and the other for the permanent financing.

For the fourth point on appeal, Financial Federal raises as error the finding and holding by the trial judge that $328,188 additional interest was charged.

Before disposition of the above issue, we note that the $328,188 figure appearing in the findings is a typographical error and should read $323,188.[4]

[6, 7] Hereunder, we first considered the trial judge's treatment of the $78,000 commitment fee as interest. A commitment fee is not a charge for the use of money but rather a purchase of the right to secure a loan of money by prospective borrower.[5] In other words, it is a consideration for the lender's setting aside or earmarking funds which are committed to be loaned in the future. Thus, we hold that the trial judge erred in categorizing as interest the one point ($78,000) commitment fee which the record in the case sub judice amply supports as being reasonable in that a one point commitment fee is customary and the acceptable practice in the trade.

We then directed our attention to the determination of the trial judge with respect to the four points ($312,000) charged as closing costs.

[4]Nevertheless, there was no mathematical error as the record reflects that the trial judge based his computations on the $323,188 figure.

[5]See, Prather, Mortgage Loans and the Usury Laws, 16 Bus. Lawyer, 181 (1960) [Section of Corporation, Banking and Business Law of the A.B.A.].

[8, 9] It is well established that a borrower may agree with the lender to pay the actual and reasonable expenses of making a loan. Pushee v. Johnson, 123 Fla. 305, 166 So. 847 (1936). The trial judge found that the actual out-of-pocket expenses of the defendant-appellant Financial Federal were $66,812. An examination of the record on appeal reveals that Financial Federal's closing statement so reflects the above figure and further illustrates that the excess was considered by the defendant Financial Federal as net earnings. Therefore, we conclude that $245,188[6] of closing costs were unreasonable and in reality were interest charges.

We also have considered appellant's final point on appeal and find it to be lacking in merit. See Curtiss National Bank of Miami Springs v. Solomon, Fla.App. 1971, 243 So.2d 475.

For the reasons cited hereinabove, we hereby modify the concluding paragraph of the herein appealed judgment to read as follows:

Upon the above Findings of fact and conclusions of law, it is

Ordered and adjudged that the Plaintiff, Burleigh House, Inc., have and recover a judgment against the Defendant, Financial Federal Savings and Loan Association, in the amount of $574,169.24 plus costs as shall hereinafter be taxed, for which sums let execution issue.

Affirmed as modified.

[6]See Prather, Mortgage Loans and the Usury Laws, 16 Bus, Lawyer, 181 (1960) [Section of Corporation, Banking and Business Law of the A.B.A.].

APPENDIX G

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.

NO. 72-19709 (Goodhart)

BURLEIGH HOUSE, INC.,

Plaintiff,

vs.

FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant.

FINAL JUDGMENT

THIS CAUSE coming on to be heard before me, the undersigned Judge of the above entitled Court, for non-jury trial. The issues were framed by the Amended Complaint, More Definite Statement and Answer to the Amended Complaint. Plaintiff has alleged usury in connection with an eighteen month, $7,000,000.00 loan, evidenced by a note payable to the Defendant in the amount of $7,800,000.00. Defendant has denied usury and raised one affirmative defense, that the action is barred by the Statute of Limitations.

This Court heard testimony for two days and listened to extensive oral arguments on the law and on the facts. Having had an opportunity to hear the witnesses, to observe their demeanor while testifying, their frankness, or lack thereof, their intelligence, their interest, if any, in the outcome of the case, and the means or opportunity they had to know about the facts upon which they testified, and having considered all of the evidence in the cause, and carefully weighed it in light of the documentary proof offered by the parties, it is hereby

CONSIDERED, ORDERED and FOUND as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant is a federally chartered savings and loan association. Plaintiff, is the developer of a 360-unit high-rise condominium. In 1968, the Defendant approached the Plaintiff and offered both construction and permanent financing for the project. Initially, Peter Herrig, Executive Vice President of the Defendant, assured the Plaintiff that the savings and loan would make 360 long term, individual loans. Upon completion of construction and the sale of the units, the long term loans would be assumed by the purchasers. It was upon these representations that the Plaintiff broke off negotiations with other financial institutions and set up its sales program. On December 20th, 1968, the Defendant requested the Plaintiff to sign a formal Application Letter (Plaintiff's Exhibit No. 1). The Application was for an eighteen month construction loan. By then facing the pressure of time, and on the repeated assurances of Herrig Defendant's officer that the details would be worked out in some manner, Plaintiff signed the Application and gave to the Defendant, a $39,000.00 fee. On January 6th, 1969, the Defendant issued its Commitment Letter (Plaintiff's Exhibit No. 2). The Commitment

was for an eighteen month construction loan of $7,000,000.00. Disbursal would be made as construction proceeded. Interest would run on the entire loan after thirteen months. For five months, the Defendant would receive interest on a substantial portion of the loan funds it still retained. Plaintiff objected to this device. Once more Herrig assured him that the interest would be abated and the construction period extended. Plaintiff signed the Commitment and paid the Defendant another $39,000.00 fee. At this point, Defendant had refused to provide a combination construction and permanent loan. It was clearly structuring two separate loans. Between January 6th, 1969 and February 26th, 1969, the date of closing of the construction loan, Plaintiff applied for an extension of the construction period (Plaintiff's Exhibit No. 4). It furnished the Defendant with its general contract showing construction was to take sixteen months from the date of commencement (Plaintiff's Exhibit No. 6). It told the Defendant it could not begin construction until April of 1969. It repeatedly urged the Defendant that it would need at least eighteen months to build and complete the building. The construction loan agreement prepared by the Defendant reflected that the construction of the building was to take eighteen months (Plaintiff's Exhibit No. 7).

Negotiations leading up to the loan were conducted between Herbert Buchwald, President of the Plaintiff, and Peter Herrig, Executive Vice President of the Defendant. Herrig is still employed as Executive Vice President of the Defendant. The Defendant did not choose to have him testify before this Court. It presented no testimony from any officer directly concerned as to its intentions in so structuring the construction loan as to provide it interest on funds

not as yet disbursed. This practice has been condemned as a device or contrivance to exact from a borrower greater interest than the usury laws permit Coral Gables First National Bank v. Constructors of Florida, Fla.App. 119 So.2d 741, Williamson v. Clark, Fla.App. 120 So.2d 637. In Williamson, the Court held:

> "Since time as well as amount of principal is a factor in the calculation of interest, it is evident that retention of a substantial portion of the loan without a corresponding abatement of interest on the amount retained has the effect of substantially increasing the per centum of interest on the actual amount advanced by the lenders and received by the borrowers, which is the significant amount contemplated by the Statute . . . "

This Court finds that at the time of making the loan, the Defendant knew it would take eighteen months to construct the building and the thirteen month provision for the running of interest was deliberately inserted as a device for exacting greater interest from the borrower.

The Defendant charged as "closing costs" on this loan, $390,000.00. It is undisputed that its actual reasonable out-of-pocket expenses were $66,812.00 (Plaintiff's Exhibit No. 20).

Florida has held that the actual and reasonable expenses of making a loan may be passed on to the borrower but all other fees are chargeable as interest Pushee v. Johnson, Fla. 166 So. 847, Ayvas v. Green, Fla. 57 So.2d 30, Mindlin v. Davis, 74 So.2d 789, Williamson v. Clark, Fla. App. 120 So.2d 637. In Pushee it was held:

> "It is also well settled in this jurisdiction that the borrower may legitimately agree with the lender to pay the actual and reasonable expenses of examining and appraising the security offered for the loan, as well as for title insurance, and the costs of closing the transaction. . . "

In Mindlin:

> " . . . the borrower may legitimately agree with the lender to pay actual reasonable expenses of examining and appraising security offered for a loan as well as the costs of closing the transaction. Examining title of the loan security and handling the closing of a loan are services traditionally rendered by attorneys at law and involve an actual expense to the lender which he may pass on to the borrower under the rule quoted. . . "

The Defendant charged the Plaintiff $390,000.00 to cover actual expenses of $66,812.00. This Court finds that $328,188.00 of "closing costs" were in fact interest, exacted as such and denoted as income on the books of the Defendant Association, as reflected in the testimony. The Defendant has argued that §665.401 F.S., F.S.A. allows it to make this charge. That Statute became effective four months after the loan here at issue was made. This Statute does not apply. Even if it did, the Statute states:

> "In lieu of such initial charges to cover such expenses and costs an association may make a reasonable charge, all or part of which may be retained by the association which renders such service or part or all of it may be paid to others who render such service. . . "

Charging a borrower $390,000.00 to cover actual out-of-pocket expenses of $66,812.00 is not a "reasonable charge" within the meaning of that Statute.

After closing, but before the Defendant began charging interest on the undisbursed portion of the loan, Plaintiff's attorney, Marshall Harris, wrote the Defendant, pointing out the inequity of the situation and the fact that the interest on the loan would exceed 22%. He requested a modification of the loan so that the interest would not run on the undisbursed portion (Plaintiff's Exhibit No. 14). It is possible to purge a usurious loan of its taint Carter v. Leon Loan & Finance Co., Fla. 146 So. 664. Defendant, clearly on notice, chose to ignore the offer and instead obtained opinion of additional counsel that it may have been exempt from Florida's usury laws. However, additional counsel refused to take a definitive position on the point (Plaintiff's Exhibit No. 15). It is obvious that the Defendant showed concern with reference to the usury laws as applied to this loan.

The effective rate of interest on the eighteen month construction loan was in excess of 15%. Both Plaintiff and Defendant's accountants have testified to this. Defendant exacted interest on an eighteen month loan of $652,169.24. It did so with the requisite intent to take more than the legal rate for the use of the money loaned.

Defendant contends that this Court should look to the substance rather than the form of the transaction. It asks the Court to spread the "closing costs" over the life of not only the construction loan but also the permanent mortgages. Courts will not remake a contract for parties All Dixie Ins. Agency v. Moffat, Fla. 212 So.2d 347,

Florida East Coast R. Co. v. Atlantic Coastline R. Co., Fla.App. 193 So.2d 660. In substance, this loan was an eighteen month construction loan. On September 1st, 1970, the Defendant had the right to demand payment in full of principal and interest (Plaintiff's Exhibit No. 8). The Defendant credited all of the "closing costs" to interest on this eighteen month construction loan. The closing statement reflected the charges as charges on this loan (Plaintiff's Exhibit No. 9). Although it eventually placed some, but not all, of the permanent mortgages, these were clearly separate loans, interest upon which varied and was not set until construction was almost completed. Thus they were separate and distinct loans. Usury depends upon the scope of rights which the lender possesses Home Credit Company v. Brown, Fla. 148 So.2d 257. The "closing costs" were included in the money lent. Defendant had the right to be repaid this money in eighteen months. They are clearly, by agreement of the parties, charges for the construction loan alone.

Defendant has raised the Statute of Limitations by affirmative defense. It had the burden to prove its defense. It did not carry its burden. It offered no proof.

A usury suit is governed by a two year statute of limitations in Florida. In Vance v. Florida Reduction Corp., Fla.App. 263 So.2d 585, the Court held:

> "Application of the Statute as construed by the Court in the Wink case thus gives the borrower a usurious interest as cause of action for the imposition of a penalty with declaration of forfeiture upon the occurrence of a payment and it is

> from the date of such payment the Statute of Limitations provided in §95.116 F.S. begins to run."

The Plaintiff testified that the last payment of interest on this construction loan was made by check dated September 28th, 1970 (Plaintiff's Exhibit No. 18). Defendant's interrogatories admit the payment was received on September 30th, 1970, and credited to interest on the construction loan (Plaintiff's Exhibit No. 20). Suit was commenced September 25th, 1972, prior to the time the Statute ran.

Finally, Defendant claims complete exemption from Florida's Usury Act by §665.395 F.S., F.S.A. This loan was made in February of 1969. At that time, the exemption was limited to State chartered savings and loan associations Sosa v. Petteway, Fla. 64 So. 433, Spinney v. Winter Park Building & Loan Association, Fla. 162 So. 897. The Usury Act itself provided in §687.031 F.S., F.S.A. 1967:

> "Sections 687.02 and 687.03 shall not be construed to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury . . . including . . . those exceptions which relate to . . . domestic building and loan associations . . . "

Domestic building and loan associations were those possessing a State charter, §665.01 F.S., F.S.A. 1967.

In June of 1969, the Savings and Loan Act was completely revised by the legislature. However, §665.53 F.S., F.S.A. provided:

> "This chapter shall not impair or affect any act done, offense committed or right accruing, accrued, or acquired, or liability, penalty, forfeiture or punishment incurred prior to June 2, 1969, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this chapter had not been passed."

Neither the old Act nor the new, exempts the Defendant from the Usury Acts. See First Federal Savings & Loan Association v. Norwood Realty Co., Ga. 93 S.E.2d 793.

Upon the above FINDINGS OF FACT AND CONCLUSIONS OF LAW, it is

ORDERED and ADJUDGED that the Plaintiff, BURLEIGH HOUSE, INC., have and recover a judgment against the Defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION in the amount of $652,169.24 plus costs as shall hereinafter be taxed, for which sums let execution issue.

DONE and ORDERED this 17th day of September, 1973.

/s/ David Goodhart

CIRCUIT JUDGE

Copies Furnished To:
Lapidus & Hollander
Sam Daniels, Esq.

APPENDIX H

EXCERPT FROM PETITION FOR REHEARING, DATED JULY 30, 1976, FILED IN SUPREME COURT OF FLORIDA ON AUGUST 2, 1976

8. Conflict is not asserted as a mere academic exercise, nor is this petition lightly made. The three justices who reached the merits all found that the usury exemption was applicable to a federal association such as Financial Federal under F.S. 665.161, and F.S. 665.18. The dissent also recognized the problem in construing the statute in a constitutionally suspect manner under the supremacy clause of the U.S. Constitution; and we flatly contend that such unequal treatment afforded to this Federal institution, having virtually the "identical powers" as domestic savings and loan associations (dissent, pg. 10), renders the statute unconstitutional under the supremacy clause and the due process and equal protection clauses of the United States Constitution (Amendment 14; Article VI, §2; see also Amendment 5; and Article I, §2, Fla. Const.).

APPENDIX I

EXCERPT FROM BRIEF OF PETITIONER, ON MERITS, BEARING DATE DECEMBER 1, 1975, AND FILED IN SUPREME COURT OF FLORIDA ON DEC. 2, 1975

The Third District Court of Appeal, in construing the usury exemption statutes here involved, held, as we have seen, that only domestic building and loan associations were exempted; and not federal associations, despite the clear language of the statutes to the contrary.

In so construing the statutes, the Third District Court of Appeal afforded them a construction which, at the very least, casts grave doubt upon their constitutionality, and at most, rendered them unconstitutional as applied here.

a) A statute which discriminates in favor of local entities, persons or associations, and against foreign entities, persons or associations, where there is no reasonable basis for the classification, most assuredly violates the equal protection of the law clauses of the United States Constitution, Amendment 14; and the Florida Constitution, Article 1, § 2; residency—without more—or place of incorporation, or charter cannot be and is not a legitimate basis for a discriminatory classification in a statute: GUSTAFSON v. CITY OF OCALA, Fla. 1951, 53 So.2d 658; HALL v. KING, Fla. 1972, 266 So.2d 33; and O'CONNELL v. KONTOJOHN 131 Fla. 783, 179 So. 783; POWER MFG. CO. v. SAUNDERS, 274 U.S. 490 (1927).

b) A statutory classification or discrimination in a state statute, at a minimum, must bear some relationship to a legitimate state purpose: WEBER v. AETNA CAS. CO., 406 U.S. 164, 172 (1972), and a desire to favor a state institution over a federal one does not suffice; see, for example, MOREY v. DOUD, 354 U.S. 457 (1957); DUKES v. CITY OF NEW ORLEANS, 5 Cir. 1974, 501 F.2d 706.

c) A federal savings and loan association, of course, is a "building and loan association" under F.S. 665.395. The terms are synonymous (see 12 U.S.C. 1424(a) and 1724(a)-1730. See also, present F.S. 665.511). Such associations are regulated by the Federal Home Loan Bank Board, pursuant to federal statute (12 U.S.C. 1437 (b)); 1464(a), commonly known as Home Owners' Loan Act of

1933, "H.O.L.A.", as amended, see § 5(a). This Court specifically has held that the Federal Government has "preempted" the regulation and supervision of federal savings and loan associations: WASHINGTON FED. SAV. & LOAN ASSOCIATION v. BALABAN, Fla. 1973, 281 So.2d 15, 17.

An effort by the Florida Legislature to favor a domestic association to the detriment of a federal one, and to regulate the federal institution in such a discriminatory manner, without a rational basis, would of course be "constitutionally suspect" under the supremacy clause of the United States Constitution (Article VI, § 2). A state may not discriminate by legislation against a federal institution, or against an entity operating under federal auspices or license in such a manner. See MOSES LAKE HOMES, INC. v. GRANT COUNTY, 365 U.S. 744, 751 (1961); PHILLIPS CHEM. CO. v. DUMAS INDEP. SCHOOL DISTRICT, 361 U.S. 376 (1960); PEREZ v. CAMPBELL, 402 U.S. 637, 648, 650 (1971).

d) A state cannot by legislation create a dual standard under which a loan made by a federal association is treated differently from the same loan made by substantially identical state chartered institution, to the detriment of the federal institution on the sole rationale that they have been chartered by different authorities. See, U. S. v. STATE TAX COMMISSION, 1 Cir. 1973, 481 F.2d 963, 967-970.

e) The Respondent's argument below was that domestic associations were entitled to special treatment because they could only make loans to members. The "loans to members only" requirement appears to have been elimi-

nated long prior to the time the instant case rose (see, F.S. 665.12(5) (1967); and the argument is inaccurate and has nothing to do with the unreasonable classification here anyhow. Both institutions presently are treated the same (F.S. 665.551), which illustrates further lack of recognition of any rational basis for classification.

APPENDIX J

EXCERPT FROM BRIEF OF PETITIONER, ON JURISDICTION, BEARING DATE JAN. 30, 1975, AND FILED IN FLORIDA SUPREME COURT OF FEB. 3, 1975

In so construing the statutes, the Third District Court of Appeal afforded the statutes a construction which casts grave doubt upon their constitutionality.*

On the same point of law, this court held exactly to the contrary, on a matter of statutory construction, in

*A statute which discriminates in favor of local entities, persons, or associations, and against foreign entities, persons or associations, where there is no reasonable basis for the classification, most assuredly violates the equal protection of the law clauses of the United States Constitution, Amendment 14; and the Florida Constitution, Article 1 § 2; residency—without more—or place of incorporation, or charter cannot be and is not a legitimate basis, without more, for a discriminatory classification in a statute: GUSTAFSON v. CITY OF OCALA, Fla. 1951, 53 So.2d 658; HALL v. KING, Fla. 1972, 266 So.2d 33; and O'CONNELL v. KONTOJOHN, 131 Fla. 783, 179 So. 802. Conflict with each of these three cases actually exists. The Respondent's argument below was that domestic associations were entitled to special treatment because they could only make loans to members. The "loans to members only" requirement was eliminated long prior to the time the instant facts arose. See, F.S. 665.21 (5) [1967]. There was and is no basis for discrimination. The interpretation given to the exemption statutes, despite their clear wording, renders the statutes "constitutionally suspect"; and casts grave doubt upon their constitutionality as interpreted.

STATE EX REL. SHEVIN v. METZ CONSTRUCTION CO., INC., Fla. 1973, 285 So.2d 598. There, this court held, with regard to statutory construction, as follows:

> "It is elementary that a statute is clothed with a presumption of constitutional validity, and if fairly possible a statute should be construed to avoid not only an unconstitutional interpretation, but also one which even casts grave doubts upon the statute's validity." (285 So.2d at 600).

Here, the Third District applied precisely a contrary principle and afforded to the exemption statutes an interpretation—unnecessarily—which to say the least casts grave constitutional doubts upon their validity. Conflict thus appears.

APPENDIX K

EXCERPT FROM PETITION FOR WRIT OF CERTIORARI, BEARING DATE JAN. 22, 1975, AND FILED IN SUPREME COURT OF FLORIDA ON JAN. 23, 1975

In so construing the statutes, the Third District Court of Appeal afforded the statutes a construction which casts grave doubt upon their constitutionality.*

*A statute which discriminates in favor of local entities, persons, or associations, and against foreign entities, persons or associations, where there is no reasonable basis for the classification, most assuredly violates the equal protection of the law clauses of the United States Constitution, Amendment 14; and the Florida Constitution, Article 1 § 2; residency—without more—or place of incorporation, or charter cannot be and is not a legitimate basis, without more, for a discriminatory classification in a statute: GUSTAFSON v. CITY OF OCALA,

(Footnotes continued on next page.)

12. On the same point of law, this court held exactly to the contrary, on a matter of statutory construction, in STATE EX REL. SHEVIN v. METZ CONSTRUCTION CO., INC., Fla.1973, 285 So.2d 598. There, this court held, with regard to statutory construction, as follows:

> "It is elementary that a statute is clothed with a presumption of constitutional validity, and if fairly possible a statute should be construed to avoid not only an unconstitutional interpretation, but also one which even casts grave doubts upon the statute's validity." (285 So.2d at 600).

Here, the Third District applied precisely a contrary principle and afforded to the exemption statutes an interpretation—unnecessarily—which to say the least casts grave constitutional doubts upon their validity. Conflict thus appears.

(Footnotes continued from preceeding page.)

Fla. 1951, 53 So.2d 658; HALL v. KING, Fla. 1972, 266 So.2d 33; and O'CONNELL v. KONTOJOHN, 131 Fla. 783, 179 So. 802. Conflict with each of these three cases actually exists. The Respondent's argument below was that domestic associations were entitled to special treatment because they could only make loans to members. The "loans to members only" requirement was eliminated long prior to the time the instant facts arose. See, F.S. 665.21 (5) [1967]. There was and is no basis for discrimination. The interpretation given to the exemption statutes, despite their clear wording, renders the statutes "constitutionally suspect"; and casts grave doubt upon their constitutionality as interpreted.

APPENDIX L

EXCERPT FROM PETITION FOR REHEARING, BEARING DATE NOV. 25, 1974, AND FILED IN THIRD DISTRICT COURT OF APPEAL OF FLORIDA

II.

THE COURT HAS OVERLOOKED SERIOUS AND SUBSTANTIAL CONSTITUTIONAL ISSUES

After holding that F.S.A. 665.161 only exempted domestic and not federal savings and loan associations from Florida usury laws, the Court wholly fails to consider whether such an interpretation is constitutional. At page 7 of both its main and reply briefs, appellant contended that such an interpretation was "constitutionally suspect" and "would surely have violated the Florida and the Federal Constitutions."

Neither common sense nor the record suggests any possible reason for making usury depend solely on whether a savings and loan association received its charter from the state or the federal government. When no reason exists for separate treatment, the equal protection clause of both the Florida and the Federal Constitution is violated by such an arbitrary classification. Cf., 45 Am.Jur.2d, Interest and Usury, § 6; BAXSTROM v. HEROLD, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620.

Appellee's argument that domestic associations were entitled to special treatment because they could only make loans to members is unsound. The "loans to members only" requirement was eliminated long before the instant facts arose. Cf., F.S.A. (1967) 665.21(5).

APPENDIX M

EXCERPT FROM REPLY BRIEF OF PETITIONER (APPELLANT), BEARING DATE MARCH, 1974, AND FILED IN THIRD DISTRICT COURT OF APPEAL OF FLORIDA

The argument that the usury exemptions to associations existed in Florida solely because associations only loaned to their own members is incorrect. Associations, for many years prior to June 2, 1969,[3] were permitted to make loans to nonmembers. Cf., F.S.A. (1967) 665.21(5). The exemption provisions were retained by the Legislature long after it abolished the loan-to-members requirement.

There is no possible justification for plaintiff's claim that Florida law allows state associations to charge higher interest rates than federal associations. The Legislature has not so provided and, had it attempted to do so, such legislation would surely have violated the Florida and the Federal Constitutions.

APPENDIX N

EXCERPT FROM BRIEF OF PETITIONER (APPELLANT) BEARING DATE JAN. 23, 1974, AND FILED IN THIRD DISTRICT COURT OF APPEAL OF FLA.

III.

ARGUMENT

For the reasons which follow, it is respectfully submitted that the final judgment below should be reversed.

[3]Under the new Act, anyone who borrows or even assumes a first mortgage loan is a "member". F.S.A. 665.021(13).

A. Error in Holding That at Times Here Material Federal Savings and Loan Associations Were Not Exempt from Usury Penalties Contained in F.S.A. Chapter 687 — Point I

The lower court held that the rights of the parties were determined by the law as it existed prior to June 2, 1969; and that under such law a savings and loan association was not exempt from the usury laws if it was chartered under federal, rather than Florida law (R. 331). Such a construction of the Florida statutes is both "constitutionally suspect" and wholly unwarranted.

APPENDIX O

ASSIGNMENTS OF ERROR

[TITLE OMITTED]

EXCERPTS FROM ASSIGNMENTS OF ERROR FILED IN CIRCUIT COURT OF 11TH JUDICIAL CIRCUIT OF FLORIDA, ON APPEAL TO THIRD DISTRICT, DATED OCTOBER 5, 1973, AND FILED ON OCTOBER 5, 1973 [R. 335-39]

The defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, hereby assigns the following as error to be relied upon for reversal of this cause on appeal.

1. The Court erred in denying defendant's motion for a summary judgment.

2. The Court erred in entering Final Judgment for plaintiff.

• • •

20. The Court erred in finding and holding in said final judgment that:

> "Neither the old Act nor the new, exempts the Defendant from the Usury Acts. See First Federal Savings & Loan Association v. Norwood Realty Co., Ga. 93 S.E.2d 793."

21. The Court erred in finding and holding in said final judgment that:

> " . . . the Plaintiff, BURLEIGH HOUSE, INC., have and recover a judgment against the Defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION in the amount of $652,169.24. . . . "

SAMS, ANDERSON, ALPER & POST, P.A.
7th Floor, Concord Building
Miami, Florida 33130
and
SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Defendant

By SAM DANIELS
Sam Daniels

APPENDIX P

EXCERPT FROM TRIAL TRANSCRIPT, T. 300-301; OF TRIAL IN 11TH JUDICIAL CIRCUIT OF FLORIDA, ON SEPT. 6, 1973, FOUND IN RECORD ON APPEAL

MR. DANIELS: May it please the Court. Mr. Lapidus has argued his series of propositions to the Court and on just about every single one of them he has to prevail to get to home base. I would like to argue a number of points, but I want to point out to the Court, at the outset, that if our position is correct on any single one of the points I am going to argue, we are entitled to prevail.

Point No. 1 is the point that we argued on the summary judgment, and it is a point we briefed and I will not belabor it here with the Court. But we say that under the statute, Federals are exempt from usury laws by the combined effect of Chapter 665 and 687, that state associations are clearly exempt and that we are entitled to the same exemption as they are under the statutory provisions of the code, and we say that that is an end to the case, and there is a very good reason for interpreting the statutes that way: It is a very highly competitive industry; there is no need to have usury laws in an industry of this type, and there is absolutely no justification for saying that, because your charter comes from the state government, to treat it any differently when your charter comes from a federal government.

Our second point which would end the case is that, if Your Honor interprets the statute differently and says that the states are exempt but not the federal, then we say

that the statute is unconstitutional. Under the Federal Constitution, the equal protection clause, it is a patent discrimination against a federal corporation in favor of a state corporation, with no possible justification for the discrimination.

THE COURT: Would it not have to be unconstitutional the other way around too?

MR. DANIELS: I think it would be, if they actually exempt building and loan associations, you have got to do it, no matter what the extent of the charter. I believe that is what the Legislature did. And we say that there is violation to both the state and the federal Constitutions, if they did not.

MIAMI REVIEW — MIAMI, FLORIDA

in the Supreme Court of the United States

OCTOBER TERM, 1976.

CASE NO. 76-638

FINANCIAL FEDERAL SAVINGS & LOAN ASSOCIATION,

Petitioner,

vs.

BURLEIGH HOUSE, INC.,

Respondent.

APPENDIX

LAPIDUS & HOLLANDER
Attorneys for Respondent
Suite 2222, First Federal Building
One S. E. Third Avenue
Miami, Florida 33131
Telephone: (305) 358-5690

MIAMI REVIEW — 371-4853 — 377-3721

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.

NO. 72-19709 (Goodhart)
General Jurisdiction Division

BURLEIGH HOUSE, INC.,
Plaintiff,

vs.

FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendant.

AMENDED COMPLAINT

Plaintiff sues Defendant and says:

1. This is an action for damages in excess of $5,000.00.

2. In February, 1969, Plaintiff, BURLEIGH HOUSE, INC., executed and delivered to the Defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, f/k/a Miami Beach Federal Savings & Loan Association, the attached mortgage and note in the amount of $7,800,000.00. Said note provides in part:

> "Interest only at the rate of Eight (8%) Percent per annum, shall be payable on the first day of each and every month hereafter, beginning March 1, 1969, and shall accrue from the date of the actual disbursement of funds, and

shall be based on amounts actually disbursed from the construction fund. Interest at the rate of Eight and Five Tenths (8.5%) Percent per annum on $7,000,000.00, less any principal reductions, shall be payable on the first day of each and every month thereafter commencing April 1, 1970.

"The entire unpaid principal indebtedness shall be due and payable on September 1, 1970."

3. At the time the note and mortgage were delivered, Plaintiff had contracted with Arkin Construction Company to build a highrise condominium building in Miami Beach. The proceeds of the construction loan were to be used to pay for construction of the building. FINANCIAL FEDERAL was told by the Plaintiff, and well knew, that it would be impossible to complete the building by April 1, 1970. The full construction fund was not to be disbursed until completion of the building.

4. Of the principal amount of the attached note, $323,188.00 was taken by the Defendants as a bonus or discount or interest willfully and knowingly exacted, taken and received.

5. Of the principal amount of the attached note, $192,810.00 was never disbursed.

6. On April 1st, 1970, $2,373,327.19 had been disbursed from the construction fund for the benefit of the Plaintiff. Pursuant to the terms of the note on that date the Defendant, Association, began charging and exacting from the Defendant, annual interest at the rate of $595,-

000.00 per year. This amounted to an effective rate of interest of 39.89%. The Defendant, Association, did not set aside the balance of the monies represented by the note. Despite this, they exacted interest on $7,000,000.00.

7. As further monies were disbursed by the Defendant/Association to the general contractor during the course of construction the effective rate of interest fell. Nonetheless, by November 11, 1970, the date upon which the loan had been completed, and repaid, the effective rate of interest over the course of the loan exacted by the Defendant from the Plaintiff pursuant to the attached note was 21%.

8. The above facts and the attached note constituted a scheme and device to corruptly reserve, charge or take, for a loan or advance of money, by way of contract, contrivance and device, interest at a greater rate than 15% per annum, in contravention of Chapter 687 F.S., F.S.A., the usury law of the State of Florida.

9. In contravention of said scheme, the Defendant did willfully, maliciously and intentionally exact from the Plaintiff, for a loan represented by the note attached hereto, interest of 21% per annum.

WHEREFORE, being injured, Plaintiff demands damages.

LAPIDUS & HOLLANDER
Attorneys for Plaintiff
410 City National Bank Building
Miami, Florida 33130 (358-5690)

By: Richard L. Lapidus

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Complaint was mailed to SAM DANIELS, Attorney for Defendant, 1414 DuPont Building, Miami, Florida 33131, this 16 day of April, 1973.

_____

Attorneys for Plaintiff

MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION
MORTGAGE NOTE

Number_____ $7,800,000.00

Miami Beach, Florida February 26, 1969

After date, for value received, the undersigned, jointly and severally, promise to pay to the order of MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, the sum of SEVEN MILLION EIGHT HUNDRED THOUSAND and No/100 ($7,800,000.00) DOLLARS, together with interest as hereinafter stated, at the rate of Eight and Five Tenths (8.5%) Percent per annum, payable as follows:

Interest only at the rate of Eight (8%) Percent per annum, shall be payable on the first day of each and every month hereafter, beginning March 1, 1969, and shall accrue from the date of the actual disbursement of funds, and shall be based on amounts actually disbursed from the construction fund. Interest at the rate of Eight and Five Tenths (8.5%) Percent per annum on $7,000,000.00, less any principal reductions, shall be payable on the first day of each and every month dhereafter commencing April 1, 1970.

The entire unpaid principal indebtedness shall be due and payable on September 1, 1970.

Larger sums may be paid at any time, but the payment of any larger or additional sum in advance of the payments herein required shall not relieve the makers of the payment of the regular monthly interest installment herein provided for. Interest shall be computed and payable in advance at the rate of Eight and Five Tenths (8.5%) Percent per annum. This note shall be considered in default when any payment required to be made hereunder shall not be paid within thirty (30) days of its due date, and shall remain in default until said payment shall have been made. While in default, this note shall bear interest at the rate of Nine (9%) Percent per annum.

All persons now or hereafter becoming parties hereto severally waive demand, notice of non-payment and protest, and jointly and severally agree that in the event of default in the payment of any installment due hereunder for a period of thirty (30) days, the whole of said indebtedness shall thereupon, at the option of the holder, become immediately due and payable, and if this note becomes in default and is placed in the hands of an attorney for collection, to pay reasonable attorney's fees for the collection thereof.

This note is secured by a mortgage of even date and the terms of said mortgage are incorporated herein and made a part hereof. In the event of variance between this note and said mortgage, the terms of the mortgage shall take precedence.

BURLEIGH HOUSE, INC.

By _____

Herbert Buchwald, President

Attest _____

M. Millio, Secretary

THIS IS A MORTGAGE DEED. Dated this 26th day of February, 1969.

By BURLEIGH HOUSE, INC., a Florida corporation
7100 Collins Avenue
Miami Beach, Florida

Hereinafter called the MORTGAGOR (Debtor-Record Owner), to MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, hereinafter called the ASSOCIATION (The Secured Party), 401 Lincoln Road, Miami Beach, Florida.

To secure the repayment of the note hereinafter described, the property encumbered is as follows:

Lots 1, 2, 3, 4, 5, and 6, inclusive, in Block 9 of NORMANDY BEACH SOUTH, according to the Plat thereof as recorded in Plat Book 21 at page 54 of the Public Records of Dade County, Florida.

Together with all gas, steam, electric, water, heating, cooking, refrigerating, lighting, plumbing, ventilating, irrigation, power, and air-conditioning systems, machines, appliances, and appurtenances, whether affixed or not and any replacements of and additions to any of the foregoing located thereon.

(Documentary stamps affixed to note and cancelled)

The Mortgagor has executed a promissory note of even date herewith to the order of the ASSOCIATION in the principal amount of $7,000,000.00, with interest (while not in default) at the rate of 8.50%, repayable as provided for in note.

The Mortgagor hereby covenants and agrees to comply with and to be bound by the terms of this Agreement, including each and every one of the covenants and agreements contained in the Master Mortgage filed in Official Records Book 3877, page 121; Official Records Book 2688, page 59; Official Records Book 928, page 724, and Official Records Book 153, page 166 of the Public Records of Dade, Broward, Palm Beach and Collier Counties, Florida, respectively, which Master Mortgage is incorporated by reference herein to the same extent as if said Master Mortgage, in its entirety, had been set forth herein verbatim.

If any of the sums of money herein referred to be not promptly and fully paid within thirty (30) days next after the same severally become due and payable, or if each and every the stipulations, agreements, conditions and covenants of said promissory note and this deed, or either, are not duly performed, complied with, and abided by, the aggregate sum advanced by the Association to the Mortgagor under the terms of the promissory note and this deed then remaining unpaid, less any consideration received by the Association for making this loan after deducting the costs of the Association in making this loan, shall become due and payable forthwith or thereafter at the option of the Association, as fully and completely as if said aggregate sum of money were originally stipulated to be paid on such a day, anything in said promissory note or herein to the contrary notwithstanding. It is the intention of the Association that in no event should the mortgagor pay more than the legal rate of interest allowed under the Laws of the State of Florida. The provisions of this paragraph shall apply to this mortgage in lieu of the provisions of Paragraph 8 in the above described Master Mortgage.

Receipt of a copy of such Master Mortgage and of the above described note (unconformed) is herewith acknowledged by the Mortgagor.

IN WITNESS WHEREOF, the said Mortgagor has caused these presents to be duly executed the day and year here first above written, at Miami Beach, Florida.
Signed, sealed and delivered in the presence of:

MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION	BURLEIGH HOUSE, INC.
By Frank C. Rauhl, Asst. Secy.	By Herbert Buchwald President
	Attest M. Millis Secretary

STATE OF FLORIDA, COUNTY OF DADE: ss

I hereby certify that _____ to me personally known, this day acknowledged before me that _____ executed the foregoing mortgage, and I FURTHER CERTIFY that I know the said person(s) making said acknowledgment to be the individual(s) described in and who executed the said mortgage.

I hereby certify that HERBERT BUCHWALD and M. MILLIS respectively _____ President and _____ Secretary of BURLEIGH HOUSE, INC., a Florida corporation to me personally known, this day acknowledged before me that they executed the foregoing mortgage as such officers of said corporation and that they affixed

thereto the official seal of said corporation and I further certify that I know the said persons making said acknowledgment to be the individuals described in and who executed the said mortgage.

IN WITNESS WHEREOF, I hereunto set my hand and official seal at Miami Beach, Dade County, Florida, this 26th day of February, 1969.

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY.

CASE NO. 72-19709 — Judge Cullen

BURLEIGH HOUSE, INC.,

Plaintiff,

vs.

FINANCIAL FEDERAL SAVINGS AND
LOAN ASSOCIATION,

Defendant.

MOTION TO DISMISS AMENDED COMPLAINT

The defendant moves the Court to dismiss plaintiff's amended complaint herein on the following ground:

failure to state a cause of action.

The specific grounds and matters of law to be argued in support of this motion are as follows:

The complaint seeks damages for alleged usury charged on a loan. The complaint alleges as a legal conclusion that "interest of 21% per annum" was "willfully, maliciously and intentionally" exacted. None of the ultimate facts necessary to state a cause of action for usury are alleged.

The complaint does not allege any of the following:

1. what interest was charged, or

2. what interest was paid, or

3. when what interest was paid, or

4. how much money was borrowed, or

5. how long what sums were borrowed.

Plaintiff's failure to allege any of the above facts makes it impossible for either the Court or this defendant to determine whether plaintiff has a cause of action. "It is a fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action for which relief may be granted." MAIDEN v. CARTER (Fla.App.1970), 234 So2d. 168.

In OCALA LOAN COMPANY v. SMITH (Fla.App. 1963), 155 So.2d 715-716, the applicable law is stated as follows:

> "The complaint must be so framed as to allege the wrong complained of with sufficient certainty to clearly apprise the court and the defendant of the nature of the claim asserted. Mere legal conclusions are fatally defective unless substantiated by sufficient allegations of ultimate fact; and every fact essential to the cause of action must be pleaded distinctly, definitely, and clearly. . . ."

With specific reference to pleading sufficient facts to establish usury, the following authorities are in point:

E. O. PAINTER FERTILIZER CO. v. FOSS (Fla.1932), 145 So. 253; 91 C.J.S. Usury, §110; 55 Am.Jur. Usury, §160.

Respectfully submitted,

SAM DANIELS

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
374-8171
Attorney for Defendant.

I HEREBY CERTIFY that on this 23rd day of April, 1973, a true copy of the foregoing Motion to Dismiss was mailed to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 31130.

SAM DANIELS

SAM DANIELS

[TITLE OMITTED]

NO. 72-19709 — (Judge Goodhart)

ANSWER TO AMENDED COMPLAINT

The defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, files this, its answer to plaintiff's amended complaint, and says:

1. Paragraph 1 is admitted.

2. The first sentence of paragraph 2 is admitted. Further answering paragraph 2, defendant says that the note is the best evidence of the terms thereof.

3. Paragraph 3 is admitted except for the allegation that "Financial Federal was told by the Plaintiff, and well knew, that it would be impossible to complete the building by April 1, 1970", which allegation is denied.

4. Paragraphs 4-9 are denied.

5. Further answering the amended complaint, defendant denies each and every allegation not expressly admitted herein.

6. Further answering the amended complaint, defendant says that some or all of plaintiff's claims are time barred by F.S.A. 95.11.

7. With reference to the More Definite Statement dated May 11, 1973, and filed herein by plaintiff, said More Definite Statement merely incorporates by reference certain of defendant's answers to first interrogatories previously filed herein which answers are themselves the best evidence of the contents thereof.

8. Further answering the amended complaint, defendant says that the same fails to state a cause of action.

SAM DANIELS

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Phone 374-8171
Attorney for Defendant.

I HEREBY CERTIFY that on this 30th day of May, 1973, a true copy of the foregoing Answer to Amended Complaint was mailed to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 33130.

SAM DANIELS

SAM DANIELS

[TITLE OMITTED]

MOTION FOR SUMMARY JUDGMENT

The defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, moves the Court to enter Summary Judgment in its favor on the ground that no genuine issue of material fact exists and defendant is entitled as a matter of law to the entry of final judgment in its favor.

The amended complaint seeks recovery of damages from defendant under F.S.A. Chpt. 687 for alleged violation of Florida's usury laws. Under F.S.A. Chpt. 665 and F.S.A. Chpt. 687, defendant, a federal savings and loan association, is now and at all times material in the past has been exempt from the provisions of F.S.A. Chpt. 687 regarding usury.

SAMS, ANDERSON, ALPER,
SPENCER & POST, P.A.
Seventh Floor, Concord Building
Miami, Florida 33130

and

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Defendant

By SAM DANIELS

SAM DANIELS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 1973, a true copy of the foregoing Motion for Summary Judgment was delivered to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 33130.

SAM DANIELS

SAM DANIELS

[TITLE OMITTED]

MEMO IN SUPPORT OF DEFENDANT FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT

I.

THE LEGAL ISSUE

Plaintiff claims that defendant charged it interest in excess of 15% on a loan and that the loan was usurous under F.S.A. Chpt. 687. If plaintiff's version of the facts and law were correct, the penalty imposed under Chpt. 687

would be the forfeiture of all interest paid on the loan. TEL SERVICE CO. v. GENERAL CAPITAL CORPORATION (Fla.1969), 227 So.2d 667.

The defendant is a federal savings and loan association and has moved for summary judgment on the ground that F.S.A. Chpt. 687 does not apply to such federal associations.

II.

SOME BACKGROUND POLICY CONSIDERATIONS

Usury laws are designed to protect hard-pressed debtors from overreaching creditors. The forfeiture and penalties provided for in usury laws are designed to deter creditors in general from charging more for the use of money than the law allows.

When the lendor is subject to strict governmental regulation regarding interest charges, he is usually exempt from the general usury laws. In such cases there is no need for private penalties and forfeitures, which are not favorites of the law, since the lendors' books, records and charges are the subject of periodic governmental audits and controls.

Federal associations are regulated by the Federal Home Loan Bank Board and under 12 U.S.C. § 1425 cannot charge interest on home loans in excess of "the lawful contract rate" or that allowed by the Board's regulations. Under § 1425, a federal association can lose its charter if its interest charges are too high. Since federals are faced

with a federal death penalty for excessive charges, there is manifestly no need for additional state penalties and forfeitures.

Florida, federal, and out-of-state savings and loan associations are also regulated to varying degrees under the provisions of F.S.A. Chpt. 665. As shown, infra, the usury provisions of Chpt. 687 do not apply to any savings and loan associations because such associations are subjected to such comprehensive governmental regulation.

III.

STATUTORY PROVISIONS EXEMPTING SAVINGS AND LOAN ASSOCIATIONS FROM USURY LAWS

The note and mortgage which plaintiff claims was usurous were executed in February of 1969. At that time, F.S.A. 687.031 provided (and still provides) that:

> "Sections 687.02 and 687.03 shall not be construed to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury (chapter 687) and specifying the interest rates and charges which may be made pursuant to such exceptions, including but not limited to those exceptions which relate to banks, Morris plan banks, discount consumer financing, small loan companies and domestic building and loan associations. Laws 1955, c. 29705, § 3."

In February of 1969, F.S.A. 665.40 provided in pertinent part that:

> ". . . Federal savings and loan associations and stockholders therein shall be entitled to the same exemptions from taxation or otherwise that are now provided by law or which may hereafter be provided by law for Florida building and loan associations and all laws now existing, providing any such exemptions are hereby made applicable to federal savings and loan associations and stockholders therein."

Moreover, F.S.A. 665.161, then provided that:

> "No fines, interest or premiums paid on loans made by any building and loan association[1] shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state, and according to the terms and stipulations of the agreement between the association

[1]F.S.A. 665.01 read as follows in February of 1969: "Every association heretofore or hereafter incorporated under any law providing for the incorporation of building, loan fund and saving associations, and every association heretofore or hereafter incorporated under any law for the purpose of accumulating funds for the use and benefit of its members, and of assisting them to accumulate money and to invest their funds and savings by cash or periodical payments on its stock or otherwise, to be loaned among its members, shall be known in this chapter as a building and loan association, and shall be subject to the provision of this chapter, except as stipulated in § 665.33. Associations organized under the laws of this state shall be known as 'domestic' associations, and those organized under the laws of any other state, territory, or nation, shall be known as 'foreign' associations. Such 'domestic' associations may carry out their purposes, and may be organized in part or wholly under the general laws of Florida relating to corporations, except as othewise provided in this chapter."

> and the borrower. Formerly § 668.09. Transferred and renumbered § 665.161, Laws 1963, c. 63-318, § 2."

On June 2, 1969, F.S.A. 665.161 was renumbered to become F.S.A. 665.395. On the same day, F.S.A. 665.511 became effective, which provides:

> "Federal savings associations or federal savings and loan associations, incorporated pursuant to the laws of the United States, as now or hereafter amended, are not foreign corporations or foreign associations. Unless federal laws or regulations provide otherwise,[2] federal associations and the members thereof shall possess all of the rights, powers, privileges, benefits, immunities and exemptions that are now provided or that hereafter may be provided by the laws of this state for associations organized under the laws of this state and for the members thereof. This provision is additional and supplemental to any provisions which, by specific reference, is applicable to federal associations and the members thereof."

To the extent that plaintiff's usury claims are based on events occurring prior to June 2, 1969, the defendant

[2]Federal rules and regulations do not prohibit state law exemptions of federal associations from usury laws. In discussing the effect of 12 U.S.C. § 1425, the dourt in JOLIET FEDERAL SAV. & L. ASS'N v. BLOOMINGTON LOAN CO., 265 N.E.2d 400, 403, said:

> ". . . This act of Congress relates to membership in the system and does not prohibit the state from exempting a Federal Savings and Loan Association from the operation of its usury laws . . ."

federal association was exempt from the usury laws under F.S.A. 687.031, 665.40 and 665.161. To the extent that plaintiff's claims are based on conduct occurring after June 2, 1969, defendant's exemption is found in F.S.A. 687.031, 665.395 and 665.511.

Usury was unknown at common law and statutes exempting persons from the operation of general usury laws are "restorative of the common law". YAFFEE v. INTERNATIONAL COMPANY (Fla.1955), 80 So.2d 910. Moreover, statutes imposing civil penalties are strictly construed in favor of the one against whom imposition of a penalty is sought. In this regard, the Supreme Court said in HOTEL AND RESTAURANT COM'N v. SUNNY SEAS NO. ONE (Fla.1958), 104 So.2d 570:

> ". . . And it is well settled that statutes imposing a penalty must always be construed strictly in favor of the one against whom the penalty is imposed and are never to be extended by construction. See Lee v. Walgreen Drug Stores Co., 1942, 151 Fla. 648, 10 So.2d 314; Lollie v. General American Tank Storage Terminals, 1948, 160 Fla. 208, 34 So.2d 306.

The fact that the Legislature indicated in subsection (2) of § 561.291 that the statute should be liberally construed to effectuate its public purpose cannot prevail over a principle of law as firmly established in our jurisprudence as that referred to above. The language of Mr. Chief Justice Marshall in United States v. Wiltberger, 5 Wheat. 76, 95-96, 5 L.Ed. 37, while referring to criminal

penalties, is equally applicable to statutes imposing a civil penalty:

> 'The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.' "

To prevail, plaintiff must claim that Florida's usury laws apply to federal but not state savings and loan associations. No reason suggests itself as to why this should be the case. The statutes clearly provide the contrary.

It is of no little significance that in the entire judicial history of this State, there is no case on the books holding Florida's usury laws applicable to either state or federal associations.

In SPINNEY v. WINTER PARK BUILDING & LOAN ASS'N. (Fla.1935), 162 So. 899, 903, the Supreme Court held that a domestic building and loan association was exempt from the general usury laws, saying:

> "The Legislature of Florida has seen fit to authorize building and loan associations to provide for fines or interest for nonpayment of dues, premiums, or interest not to exceed 5 cents per share for each monthly delinquency, and it is further

provided that all fees, fines, premiums, and interest shall be provided for in the bylaws and shall be credited to earnings out of which expenses and dividends shall be paid, and it is further provided that no such charges or payments shall be deemed usurious, even if in some cases exceeding the legal rate of interest, and it is provided further that same may be collected by law as other debts of like amounts are collected in this state.

So, under the allegations of the bill, the Johnsons themselves could not have interposed the defense of usury."

Most states contain statutes in one form or another exempting building and loan associations from usury laws under certain circumstances. The early cases are collected in an annotation at 74 A.L.R. 973. The issue is also discussed in 13 Am.Jur.2d, Building & Loan Assoc., § 57 and in 12 C.J.S., Building & Loan Assoc., § 77 ("It is generally held, frequently by virtue of statute, that building and loan associations, due to their peculiar nature, are not subject to the general usury laws.")

CONCLUSION

It is respectfully submitted that defendant's motion for summary judgment should be granted.

Respectfully submitted,

SAMS, ANDERSON, ALPER,
SPENCER & POST, P.A.
7th Floor, Concord Building
Miami, Florida 33130

By_____
MURRAY SAMS

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 1973, a true copy of the foregoing Memo was mailed to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 33130.

SAM DANIELS

[TITLE OMITTED]

ASSIGNMENTS OF ERROR

The defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, hereby assigns the following as error to be relied upon for reversal of this cause on appeal.

1. The Court erred in denying defendant's motion for a summary judgment.

2. The Court erred in entering Final Judgment for plaintiff.

3. The Court erred in finding and holding in said final judgment that:

> ". . . On December 20th, 1968, the Defendant requested the Plaintiff to sign a formal Application Letter (Plaintiff's Exhibit No. 1). The Application was for an eighteen month construction loan. . . ."

4. The Court erred in finding and holding in said final judgment that:

> ". . . On January 6th, 1969, the Defendant issued its Commitment Letter (Plaintiff's Exhibit No. 2). The commitment was for an eighteen month construction loan of $7,000,000.00."

5. The Court erred in finding and holding in said final judgment that:

> ". . . Plaintiff signed the Commitment and paid the Defendant another $39,000.00 fee. At this point, Defendant had refused to provide a combination construction and permanent loan. It was clearly structuring two separate loans. . . ."

6. The Court erred in finding and holding in said final judgment that:

> "This Court finds that at the time of making the loan, the Defendant knew it would take eighteen months to construct the building and the thirteen month provision for the running of interest was deliberately inserted as a device for exacting greater interest from the borrower."

7. The Court erred in finding and holding in said final judgment that:

> "The Defendant charged as 'closing costs' on this loan $390,000.00. . . ."

8. The Court erred in finding and holding in said final judgment that:

> "Florida has held that the actual and reasonable expenses of making a loan may be passed on to the borrower but all other fees are chargeable as interest. . . ."

9. The Court erred in finding and holding in said final judgment that:

> "The Defendant charged the Plaintiff $390,000.00 to cover actual expenses of $66,812.00. This Court finds

that $328,188.00 of 'closing costs' were in fact interest, exacted as such and denoted as income on the books of the Defendant Association, as reflected in the testimony. . . ."

10. The Court erred in finding and holding in said final judgment that:

". . . Defendant has argued that §665.401 F.S., F.S.A. allows it to make this charge. That Statute became effective four months after the loan here at issue was made. This Statute does not apply. . . ."

11. The Court erred in finding and holding in said final judgment that:

". . . Even if it did, the Statute states:

'In lieu of such initial charges to cover such expenses and costs an association may make a reasonable charge, all or part of which may be retained by the association which renders such service or part or all of it may be paid to others who render such service . . .'

Charging a borrower $390,000.00 to cover actual out-of-pocket expenses of $66,812.00 is not a 'reasonable charge' within the meaning of that Statute."

12. The Court erred in finding and holding in said final judgment that:

"The effective rate of interest on the eighteen month construction loan was in excess of 15%. Both Plaintiff and Defendant's accountants have testified to this. . . ."

13. The Court erred in finding and holding in said final judgment that:

". . . Defendant exacted interest on an eighteen month loan of $652,169.24. . . ."

14. The Court erred in finding and holding in said final judgment that:

". . . It did so with the requisite intent to take more than the legal rate for the use of the money loaned."

15. The Court erred in finding and holding in said final judgment that:

". . . In substance, this loan was an eighteen month construction loan. . . ."

16. The Court erred in finding and holding in said final judgment that:

". . . On September 1st, 1970, the Defendant had the right to demand payment in full of principal and interest (Plaintiff's Exhibit No. 8). . . ."

17. The Court erred in finding and holding in said final judgment that:

". . . The Defendant credited all of the 'closing costs' to interest on this eighteen month construction loan. The closing statement reflected the charges as charges on this loan (Plaintiff's Exhibit No. 9). Although it eventually placed some, but not all, of the permanent mortgages, these were clearly separate loans, interest

upon which varied and was not set until construction was almost completed. Thus they were separate and distinct loans. Usury depends upon the scope of rights which the lender possess Home Credit Company v. Brown, Fla. 148 So.2d 257. The 'closing costs' were included in the money lent. Defendant had the right to be repaid this money in eighteen months. They are clearly, by agreement of the parties, charges for the construction loan alone."

18. The Court erred in finding and holding in said final judgment that:

"Defendant has raised the Statute of Limitations by affirmative defense. It had the burden to prove its defense. It did not carry its burden. It offered no proof."

19. The Court erred in finding and holding in said final judgment that:

"The Plaintiff testified that the last payment of interest on this construction loan was made by check dated September 28, 1970 (Plaintiff's Exhibit No. 18). Defendant's interrogatories admit the payment was received on September 30th, 1970, and credited to interest on the construction loan (Plaintiff's Exhibit No. 20). Suit was commenced September 25th, 1972, prior to the time the Statute ran."

20. The Court erred in finding and holding in said final judgment that:

"Neither the old Act nor the new, exempts the Defendant from the Usury Acts. See First Federal Savings & Loan Association v. Norwood Realty Co., Ga. 93, S.E. 2d 793."

21. The Court erred in finding and holding in said final judgment that:

". . . the Plaintiff, BURLEIGH HOUSE, INC., have and recover a judgment against the Defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION in the amount of $652,169.24. . . ."

SAMS, ANDERSON, ALPER
& POST, P.A.
7th Floor, Concord Building
Miami, Florida 33130
and
SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Defendant

By Sam Daniels

SAM DANIELS

I HEREBY CERTIFY that on this 5th day of October, 1973, a true copy of the foregoing Assignments of Error was mailed to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 33130.

SAM DANIELS

SAM DANIELS

II.

POINTS ON APPEAL

The points on appeal are:

I.

WHETHER THE LOWER COURT ERRED IN HOLDING THAT, AT ALL TIMES HERE MATERIAL, FEDERAL SAVINGS AND LOAN ASSOCIATIONS WERE NOT EXEMPT FROM THE USURY PENALTIES PROVIDED FOR IN F.S.A. CHAPTER 687. (Raised by Assignments of Error Nos. 1-2, 20-21. R. 335-339).

II.

WHETHER THE LOWER COURT ERRED IN HOLDING THAT ALL COSTS DEEMED INTEREST SHOULD ONLY BE "SPREAD" OVER AN EIGHTEEN MONTH PERIOD. (Raised by Assignments of Error Nos. 1-5, 12-13, 15-17, 21. R. 335-339).

III.

WHETHER THE LOWER COURT ERRED IN HOLDING THIS SUIT WAS BROUGHT WITHIN THE REQUIRED TWO YEAR STATUTE OF LIMITATIONS PERIOD APPLICABLE IN ACTIONS TO RECOVER STATUTORY PENALTIES. (Raised by Assignments of Error Nos. 1-2, 18-19. R. 335-339).

Points on Appeal re Brief of Appellant submitted January 23, 1974.

IV.

WHETHER THE LOWER COURT ERRED IN FINDING AND HOLDING THAT WITH THE EXCEPTION OF THE $66,812 PAID TO OTHERS, ALL OF THE $390,000 COMMITMENT FEE AND ADDITIONAL CLOSING COSTS (SOME $328,188) WAS "IN FACT INTEREST" UNDER F.S.A. CHAPTER 687. (Raised by Assignments of Error Nos. 2, 7-13, 21. R. 335-339).

V.

WHETHER THE LOWER COURT ERRED IN FINDING AND HOLDING THAT THE FEDERAL INTENDED TO VIOLATE F.S.A. CHAPTER 687. (Raised by Assignments of Error Nos. 2, 5-6, 14, 21. (R. 335-339).

665.01 Associations affected; "domestic" and "foreign" associations.—Every association heretofore or hereafter incorporated under any law providing for the incorporation of building, loan fund and saving associations, and every association heretofore or hereafter incorporated under any law for the purpose of accumulating funds for the use and benefit of its members, and of assisting them to accumulate money and to invest their funds and savings by cash or periodical payments on its stock or otherwise, to be loaned among its members, shall be known in this chapter as a building and loan association, and shall be subject to the provision of this chapter, except as stipulated in §665.33. Associations organized under the laws of this state shall be known as "domestic" associations, and those organized under the laws of any other state, territory, or nation, shall be known as "foreign" associations. Such "domestic" associations may carry out their purposes, and may be organized in part or wholly under the general laws of Florida relating to corporations, except as otherwise provided in this chapter.

History.—§1, ch. 10028, 1925; §1, ch. 11865, 1927; CGL 6151.

665.161 Collection of fines, interest or premiums on loans made by building and loan associations.—No fines, interest or premiums paid on loans made by any building and loan association shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state, and according to the terms and stipulations of the agreement between the association and the borrower.

History.—§8, ch. 4158, 1893; GS 2755; RGS 4242; CGL 6192; §2, ch. 63-318.

Note.—Tr. from §668.09.

cf.—Ch. 687, Interest and usury.

665.21 Regulation of loans to stockholders, etc.—

(1) Any association shall have power to loan or advance to stockholders or members thereof money of the association, including money paid for capital stock as provided in §665.05 and to secure payment of such money and the performance of all of the conditions upon which the loans are made by pledge of shares in said association, or by note, or bond, and mortgage on real estate situated in the state, or situated in another state if located within one hundred miles of the principal office of the association, owned in fee or leased for a period extending or renewable automatically for at least ten years beyond the date specified for the final principal payment of the loan obligation, by the borrower, which mortgage shall be a first lien thereon, except taxes and special assessments, and except the prior liens held and owned by said association, provided, however, that nothing herein shall be construed to prohibit any association from accepting additional collateral of any character as additional security for the payment of a loan previously consummated; to loan funds of the association (except that portion of its authorized capital stock specified in §665.05) upon the pledge of the shares only of such association, provided, that loans on stock shall not exceed one hundred per cent of the withdrawal value of stock at the time it is pledged. All notes, bonds and other obligations bearing date prior to January 1, 1942, which are held by savings, building and loan associations having their principal place of business in the state, and which are secured by mortgage, deed of trust or other lien upon real property

situated in Florida shall be exempt from the provisions of chapters 199 and 201 and any law superseding same or amendatory thereof.

(2) The by-laws of each association shall prescribe the manner of awarding loans, the rate of interest and the premium to be charged and the time and manner in which the interest and premium, if any, shall be paid. No such association is required to maintain uniformity among loans made by it with respect to rates of interest, maturity of principal, plan of repayment, amount and time of payment of installments upon principal, and other terms, provisions and conditions of such loans and the contract evidencing them, but may, when authorized by its by-laws, make loans with differences between them with respect to rates of interest, maturity of principal, plan of repayment, amount and time of payment of installments upon principal, and other terms, provisions and conditions of such loans and the contracts evidencing them, and is authorized to make loans at such rate of interest and with such maturity of principal, such plan of repayment, such amount and time of payment of installments upon principal, and such other terms, provisions and conditions of such loans and the contracts evidencing them, as its by-laws may prescribe, provided, all loans shall conform to all requirements of law with respect to the character, extent and value of the security therefor.

(3) No building and loan association shall make any loan either directly or indirectly to any of its officers, directors or employees, provided, however, that loans may be made to an officer, director or employee if secured by a mortgage upon his home or by an assignment of the stock owned by him in the association. Loans made to officers,

directors or employees, secured by assignment of stock, shall not exceed ninety per cent of the withdrawal value of the stock at the time the loan is made.

(4) Building and loan associations shall lend their funds only on the security of their own shares or on the security of first liens upon homes or combination homes and business property in accordance with rules and regulations promulgated by the comptroller, except that not exceeding twenty per cent of the assets of such association may be loaned on other improved real estate without regard to said ninety per cent limit, but secured by first lien thereon.

(5) In case there is not sufficient demand for loans on the part of stockholders on real estate mortgages or the stock of the association, which are acceptable to the board of directors, any association shall have the power to lend its funds upon or purchase first mortgages upon improved real estate, provided, the loans secured by the mortgage purchased or accepted as collateral does not exceed seventy per cent of the fair value of the real estate mortgaged, and also to lend its funds upon or invest in the obligations of the United States, Florida, any county or municipality of the state, any federal home loan bank or the home owners loan corporation, and also to lend its funds upon or purchase the stock or promissory notes of any other domestic building and loan association, or invest in the savings shares or investment shares of federal savings and loan association, doing business in the state.

(6) Upon the approval of the state comptroller any building and loan association may subscribe and pay for shares of stock in any federal home loan bank or other

federal or reserve corporation, created or authorized by the laws of the United States or this state, to lend money to building and loan association or any federal savings and loan association and may purchase, sell or hypothecate the securities, bonds, notes or debentures issued by any such federal home loan bank or other federal or reserve corporation or federal savings and loan association and payment for such stock, securities, bonds, notes, or debentures may be made from any funds which the association may have on hand or by the transfer of any other assets. All subscriptions to or purchase of any stock, securities, bonds, notes or debentures heretofore made by an association are hereby validated, confirmed and made legal.

(7) The provisions of §665.25(3) prohibiting the assignment or transfer of evidences of indebtedness or mortgages securing the same taken by any building and loan association for the payment of any loan shall not apply to:

(a) The investments permitted by this section, or to notes and mortgages received by the association to evidence and secure the balance of the sale price of any real estate sold by it, provided such latter notes are not secured by the assignment of shares of stock in the association; or,

(b) The sale of any loan by a domestic association at any time if the total dollar amount of loans sold, including such sale, within the calendar year beginning January 1 immediately preceding the date of such sale, does not exceed a sum equivalent to twenty per cent of the dollar amount of all loans held by such domestic association at the beginning of such calendar year. The limitation upon the sale of loans may be adjusted in the case of any domestic association upon application to and approval by the state

comptroller. All loans sold shall be sold without recourse, and if under a contract to service the same, then on a basis to provide sufficient compensation to the domestic association to reimburse it for expenses incurred under its service contract.

(8) Without regard to any other provision of this section any domestic association whose general reserves, surplus and undivided profits aggregate a sum in excess five per cent of its withdrawable accounts is authorized to invest an amount not exceeding at any one time five per cent of such withdrawable accounts in loans to finance the development of land or the acquisition and development of land for primarily residential usage, subject to such rules and regulations as the comptroller may prescribe; provided, however, that no such loan shall exceed sixty per cent of the appraised value of the property to be developed.

(9) Subject to the approval of the state comptroller, any domestic association which is a member of the federal home loan bank system and whose accounts are insured by the federal government or an instrumentality thereof, without regard to any other provision of this section to the contrary, may make any loan or investment which such association could make were it incorporated and operating as a federal association domiciled in this state.

History.—§20, ch. 10028, 1925; §15, ch. 11865, 1927; §3, ch. 15908, 1933; §1, ch. 16842, 1935; §1, ch. 16844, 1935; CGL 1936 Supp. 6183(2); §1, ch. 19110, 1939; §1, ch. 20931, 1941; §7, ch. 22858, 1945; §1, ch. 23949, 1947; §1, ch. 59-241; §1, ch. 61-137; §1, ch. 63-206; §3, ch. 65-7; §1, ch. 67-95.

In the Supreme Court of the United States

OCTOBER TERM, 1976

CASE NO. 76-638

FINANCIAL FEDERAL SAVINGS & LOAN ASSOCIATION,

Petitioner,

vs.

BURLEIGH HOUSE, INC.,

Respondent.

RESPONDENT'S BRIEF

JURISDICTION

LAPIDUS & HOLLANDER
Attorneys for Respondent
Suite 2222, First Federal Building
One S. E. Third Avenue
Miami, Florida 33131
Telephone: (305) 358-5690

MIAMI REVIEW — 371-4853 — 377-3721

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FINANCIAL FEDERAL SAVINGS & LOAN ASSOCIATION,

Petitioner,

vs.

BURLEIGH HOUSE, INC.,

Respondent.

RESPONDENT'S BRIEF

JURISDICTION

INTRODUCTION

Petition For Certiorari is sought to review a decision of the Third District Court of Appeals of Florida. The parties will be referred to as they appear in this Court. Reference to Petitioner's Appendix will be by the letter "A". Since the Florida statutes Petitioner claims invalid were changed effective June, 1969 and this case only deals

with pre 1969 Florida law, the relevant Florida statutes as they appeared in 1969 are set out in Respondent's Appendix. Reference to Respondent's Appendix will be by the letters "AA".

STATEMENT OF THE CASE

By an amended complaint filed in the Circuit Court for the Eleventh Judicial Circuit, Petitioner was charged with violating the usury laws of Florida by exacting twenty-one percent interest on a loan of money (AA. 1-10). It filed a motion to dismiss claiming the amended complaint pled insufficient facts (AA. 10-11). No Constitutional question was raised. It answered the complaint, admitting and denying and raising the applicable statute of limitations (AA. 12-14). No Constitutional question was raised. It moved for summary judgment claiming immunity from the usury law by virtue of a Florida exemption statute (AA. 15). It supported its motion by a memorandum of law outlining its argument (AA. 16-24). In neither the motion nor the memorandum was a Constitutional question raised. The case proceeded to trial on the amended complaint and answer. After the trial, in oral argument to the Judge, counsel for Petitioner opined that Florida's exemption statute might be unconstitutional (A. 43-44). This was the only mention of a Federal question in the state trial court. Florida requires that absent fundamental error, a Constitutional question, to be decided, must be first raised in the trial court by pleadings *Henderson v. Antonacci*, Fla. 62 So.2d 5.

No Constitutional question having been raised in the trial court, none was decided by the trial Judge who found that Petitioner had indeed violated Florida's usury statute and exacted over twenty percent interest (A. 24-32).

Florida requires that in order to be raised on appeal, absent fundamental error, a Constitutional question must first be properly raised in the trial court *Gleason v. Dade County*, Fla.App. 174 So.2d 466.

Petitioner filed its appeal to the Third District Court of Appeals of Florida. There are two levels of appellate courts in Florida, the Supreme Court and four District Courts of Appeal. Florida Appellate Rule 2.1(5) provides that:

> "Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right . . . from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution. . ."

The District Courts of Appeal have jurisdiction of appeals which may not be taken as a matter of right to the Supreme Court of Florida, Constitution of the State of Florida, Art. V, §4(b).

By appealing to the District Court of Appeal, rather than the Supreme Court of Florida, the Constitutional appellate court, no review was sought of any Constitutional point.

Petitioner filed assignments of error (AA. 25-30) and a brief containing points to be argued on appeal (AA. 31-32) as required by Florida Appellate Rule 3.7(f)(4). Neither raised a Constitutional question. Florida appellate

procedure requires that judicial error of the lower court be assigned and argued under separate points on appeal in an appellate brief *Florida Citrus Commission v. Owens*, Fla. App. 239 So.2d 840. Only at the conclusion of its brief and in its reply brief did Petitioner mention any Constitutional claim (A. 40-41). This was insufficient under Florida procedure to raise the point *State v. Miami Coin Club*, Fla. 88 So.2d 293.

The opinion of the District Court of Appeal, dated November 12, 1974 of which review is here sought, plainly did not pass upon any Constitutional question. None had been presented to it.

By a petition for rehearing to the District Court of Appeal, Petitioner first directly questioned the Constitutionality of Florida's exemption statute (A. 39). Under Florida procedure no new ground or position may be assumed in a petition for rehearing *Corporate Group Service, Inc. v. Lymberis, Fla.* 146 So.2d 745. The petition was denied January 9, 1975.

Petitioner then sought certiorari to the Supreme Court of Florida, a discretionary writ, based upon conflict with other opinions. Florida Appellate Rule 2.1(5)(b) provides:

> "Appeals from district courts of appeal may be taken to the Supreme Court as a matter of right only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. . . "

The term "initially passing upon the validity of a state statute" means in a given proceeding that the validity of a statute was first called into question in the District Court of Appeal, as where the case is one of original jurisdiction in the District Court of Appeal or where fundamental error is first there raised. It does not mean that the case must be one of first impression *State v. Furen*, Fla. 118 So.2d 6, *In re Kionka's Estate*, Fla. 121 So.2d 644 concurring opinion adopted in *Hightower v. Bigoney*, Fla. 156 So.2d 501. The Supreme Court of Florida, by the Constitution of Florida, Art. V, §3(b)(1) and Florida Appellate Rule 2.1(5) is the Court of last resort of Florida for cases passing upon the Constitutionality of a state statute. An appeal is there afforded as a matter of right.[1]

Petitioner did not appeal as a matter of right from the Third District Court of Appeal to the Supreme Court of Florida. It filed a petition for certiorari based upon decisional conflict. The Supreme Court found no decisional conflict and discharged the Writ of Certiorari. It never assumed jurisdiction.

Ten months after the District Court rendered its decision Petitioner sought review by this Court.

---

[1]In all Florida cases where this Court has directed writ of certiorari to decisions of the District Courts of Appeal of Florida, Petitioners had attempted an appeal, as a matter of right to the Supreme Court of Florida *Ocala Star-Banner Co. v. Wahl*, 401 U.S. 295, 91 S.Ct. 628, 28 L. Ed. 2d 57, *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L. Ed. 2d 446.

ARGUMENT

I

CERTIORARI WILL NOT LIE SINCE THE JUDGMENT SOUGHT REVIEW WAS NOT RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD.

II

CERTIORARI WILL NOT LIE SINCE THE CONSTITUTIONALITY OF THE STATUTE WAS NOT DRAWN INTO QUESTION IN THE TRIAL COURT, THE APPELLATE COURT OR MENTIONED IN THE DECISION SOUGHT REVIEW.

III

CERTIORARI WILL NOT LIE, NO SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.

I

CERTIORARI WILL NOT LIE SINCE THE JUDGMENT SOUGHT REVIEW WAS NOT RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD.

28 U.S.C. §1257 vests jurisdiction in the Supreme Court of the United States to review by certiorari:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . ."

28 U.S.C. §2101 requires a petition for writ of certiorari to be filed within ninety days of the judgment of that court.

Florida's highest court is the Supreme Court of Florida to which, in cases where the validity of a state statute is passed upon or the federal Constitution construed, an appeal is afforded as a matter of right. The Supreme Court of Florida also has discretionary jurisdiction to review by certiorari cases involving decisional conflicts. This Court has, by 28 U.S.C. §1257, jurisdiction to review by certiorari decisions of the highest court of a State:

> ". . . where the validity of a State statute is drawn into question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States . . ."

The highest court of Florida, in this instance, is the Supreme Court of Florida.

Petitioner did not appeal to the Supreme Court of Florida. It sought discretionary certiorari based on decisional conflict (A. 3-12, A. 37-38). The Supreme Court of Florida held it had no jurisdiction to review by certiorari since there was no decisional conflict (A. 3-7). Under Florida practice an appeal improvidently taken may be treated as a petition for certiorari, but a petition for certiorari improvidently taken may not be treated as an appeal *Bartow Growers Proc. Corp. v. Florida Gr. Proc. Corp.*, Fla. 71 So.2d 165.

Not having appealed to the Supreme Court of Florida, the highest court of that State, Petitioner cannot here obtain certiorari to review a decision of an intermediate state court.

Petitioner cites *Randall v. Board of Commissioners*, 201 U.S. 252, 43 S.Ct. 252, 67 L.Ed. 637 and *American Express Co. v. Levee*, 252 U.S. 19, 19 S.Ct. 11, 68 L.Ed. 140 in support of its contention that the writ will lie. Neither is applicable. *Randall* involved certiorari to the Indiana Appellate Court. The Supreme Court of Indiana had only discretionary jurisdiction which it declined to exercise. *American Express* involved certiorari to the Louisiana Court of Appeal rather than the Louisiana Supreme Court. Mr. Justice Holmes there pointed out:

> "But under the Constitution of the State jurisdiction of the Supreme Court is discretionary, Article VII, Section II, and although it was necessary for the Petitioner to invoke that jurisdiction to make it certain that the case could go no farther, when the jurisdiction was declined the Court of

> Appeal was shown to be the highest Court of the State in which a decision could be had . . ."

Here jurisdiction of the Supreme Court of Florida was not discretionary, but of right. Petitioner failed to invoke it by filing an appeal. More applicable is *Matthews v. Huwe*, 269 U.S. 262, 76 S.Ct. 108, 70 L.Ed. 266 where review was afforded to the Supreme Court of Ohio by both writ of error and writ of certiorari. Petitioner there filed a writ of error which was denied but did not file a petition for writ of certiorari. This Court held that petitioner had failed to exhaust all of its remedies for review by the Supreme Court of Ohio and declined to exercise jurisdiction. Also *Gorman v. Washington University*, 316 U.S. 98, 62 S.Ct. 962, 86 L.Ed. 1300 where Missouri permitted appeal to a division of the Supreme Court of Missouri in non-Constitutional cases but permitted appeal to the Court en banc in cases challenging the Constitutionality of a State statute. Petitioner had appealed to a division of the Court but had not requested a hearing en banc. This Court refused to exercise jurisdiction since Petitioner had failed to exhaust its State appellate remedies, the division Court was not the highest Court of the State. Finally *Gotthilf v. Sills*, 375 U.S. 79, 11 L.Ed.2d 159, 84 S.Ct. 187, a New York case where petitioner appealed to the Appellate Division and then attempted appeal unsuccessfully to the Court of Appeals. The order appealed was interlocutory. New York practice required permission from the Appellate Division to appeal an interlocutory order. This Court, declining to exercise jurisdiction held:

> "The petitioner at no time applied to the Appellate Division for such permission. It therefore appears that the Appellate Division, First Judi-

cial Department, was not the last state court in which a decision of that [constitutional] question could be had . . ."

Here Petitioner did not appeal to the Supreme Court of Florida either from the order of the trial Judge or from the decision of the Third District Court of Appeal. It had, under Florida law, a right of appeal to that Court on Constitutional questions. It failed to exercise that right.

Certiorari will not lie.

II

CERTIORARI WILL NOT LIE SINCE THE CONSTITUTIONALITY OF THE STATUTE WAS NOT DRAWN INTO QUESTION IN THE TRIAL COURT, THE APPELLATE COURT OR MENTIONED IN THE DECISION SOUGHT REVIEW.

Florida practice requires that, absent fundamental error, before a Florida appellate court will pass upon a Constitutional issue, it must have first have been properly raised in the trial court *Carlton v. Fidelity & Deposit Company of Maryland*, Fla. 154 So. 317, *Gleason v. Dade County*, Fla. App. 174 So.2d 466. Even fundamental error must be briefed and argued. Petitioner did not challenge the validity of the statute here challenged in the trial court nor, until its petition for rehearing, in the Third District Court of Appeals. The decision here sought review reflects no Constitutional challenge nor does it pass upon any Constitutional point.

Where, though a requirement of state practice, the point arising under the Constitution of the United States is not properly drawn into question in the trial court, this Court will not grant Certiorari *Morrison v. Watson*, 154 U.S. 1111, 14 S.Ct. 995, *Erie Railroad v. Purdy*, 185 U.S. 148, 22 S.Ct. 605, 46 L.Ed. 847, *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480, *Louisville & Nashville Railroad Company v. Woodford*, 234 U.S. 546, 34 S.Ct. 739, 58 L.Ed. 1202. Where, though obliquely raised in the trial court it is not argued to the appeals court by proper assignment of error and brief, certiorari will not lie *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530. Where plainly the appellate court did not pass upon the Constitutional point, certiorari will not lie *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 572.

Under any test, here certiorari will not lie.

III

CERTIORARI WILL NOT LIE, NO SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.

There are no special and important reasons for granting a writ of certiorari in this case. There is no federal question to be here decided.

The Florida exemption statute, the application of which Petitioner claims violated its rights guaranteed by the Fourteenth Amendment to the United States Constitution, was no longer applicable after June of 1969. Florida's

statute of limitations for usury was two years (A. 16-23). No other states, it is claimed, have similar statutes. No issue of future application is raised.

The exemption statute in 1969, §665.161 F.S. exempted building and loan associations from the State usury laws. It was economic legislation not affecting fundamental rights, not Constitutionally suspect and only subject to question as to reasonability of the State classification *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 377, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797.

Building and Loan Associations created by Chapter 665 of the Florida Statutes were stock associations primarily limited to making loans to their own stockholders §665.01 F.S. Only when there was not sufficient demand for loans from stockholders could loans be made to outsiders §665.21(5) F.S. The maximum interest rate which could be charged was required to be set out in the by-laws adopted by the members who would borrow the money §665.18 F.S. In describing the building and loan exemption the Supreme Court of Florida in *Spinney v. Winter Park Building & Loan Assn.*, Fla. 162 So. 889 held:

> ". . . And so it is that one subscribed for stock for the very purpose of being eligible to become a borrower from the fund which he helps to create by the payment of his stock subscription. The stockholder of the building and loan association is recipient pro tanto of such benefits as may accrue from the contract which he executes with with the association as well as from the contracts which all other stockholders execute with the association. This being so the Legislature has lifted the ban of usury to such an extent as to allow the stockholders to contract more liberally between themselves . . ."

Federal Savings and Loan Associations are not stock associations and could not convert to stock associations until June 30, 1976 12 U.S.C. §1725(j)(l). They were not limited to loans to members 12 U.S.C. §1464(c). They were not limited in the interest they could charge by their by-laws. Interest rates are not set by the Home Loan Bank Board. Members did not receive the benefits of higher profits.

A rational basis existed in 1969 for the classification. No federal question was involved.

Even if no rational basis existed, in this case no federal question is involved. The Florida Court in the decision sought review held the statute means what it says, only building and loan associations are exempt, not savings and loan associations. This Court must accept the state court interpretation of the State statute *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 222. If Petitioner is correct the statute is unconstitutional, a total nullity *Perez v. Campbell*, (Supra). The statute is an exemption statute. If the exemption statute is void all associations building and loan as well as savings and loan are subject to Florida's usury act. Petitioner has no standing to here claim error, for if the statute is void or the statute is viable, it is still subject to Florida's usury act.

No special and important reasons exist for granting Writ of Certiorari.

CONCLUSION

Petitioner does not seek certiorari to the highest Court of Florida in which a decision could be had. The petition was not filed within ninety days of the rendition of the decision sought review. Petitioner did not raise the Constitutional point timely under state practice. The opinion sought review clearly does not pass upon the validity of a state statute. No federal question is present. No compelling reason exists of granting the Writ sought.

Respectfully submitted,

LAPIDUS & HOLLANDER
Attorneys for Respondent
Suite 2222, First Federal Building
One S.E. Third Avenue
Miami, Florida 33131
Telephone: (305) 358-5690

BY: _____
RICHARD L. LAPIDUS

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to SAM DANIELS, Esq., Attorney for Petitioner, 1414 duPont Building, Miami, Florida, 33131, and ROBERT ORSECK, Esq., Podhurst, Orseck & Parks, P.A., Attorneys for Petitioner, 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 1 day of ~~November~~ Dec., 1976.

BY: _____
RICHARD L. LAPIDUS

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-638

FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

vs.

BURLEIGH HOUSE, INC.,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SAM DANIELS, ESQUIRE
1414 duPont Building
Miami, Florida 33131

and

PODHURST, ORSECK & PARKS, P.A.
Suite 1201, 25 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioner

By ROBERT ORSECK, ESQUIRE

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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CASES

AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-638

FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

vs.

BURLEIGH HOUSE, INC.,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

This reply brief of the petitioner, in support of the petition for writ of certiorari, is filed pursuant to Rule 24(4) of this Court. We reincorporate herein the petition and appendix, and pursuant to Rule 24(4) address the reply brief to the arguments of the respondent "first raised" in the brief in opposition.

A. Appendix to Petition

R. Reference to pages to record on appeal lodged in Florida appellate court

T. References to pages of trial transcript contained in record on appeal

ARGUMENT

I. JUDGMENT WAS RENDERED BY HIGHEST COURT IN FLORIDA IN WHICH DECISION COULD BE HAD; PETITION TIMELY FILED IN THIS COURT (ARGUMENT I OF RESPONDENT WITHOUT MERIT).

II. PETITIONER AT ALL RELEVANT STAGES CHALLENGED CONSTITUTIONALITY OF INTERPRETATION OF FLORIDA STATUTES WHICH WOULD EXCLUDE IT FROM USURY EXEMPTION; ISSUE PROPERLY RAISED WHETHER FLORIDA COURTS SPECIFICALLY WROTE OPINIONS ON IT OR NOT (POINT II OF RESPONDENT WITHOUT MERIT).

III. GRAVE AND IMPORTANT CONSTITUTIONAL REASONS EXIST FOR GRANTING WRIT (POINT III OF RESPONDENT WITHOUT MERIT)

I. Judgment Was Rendered by Highest Court in Florida in Which Decision Could Be Had; Petition Timely Filed in This Court (Argument I of Respondent Without Merit).

The respondent seeks to prevent review of the grave and significant Constitutional issue, by challenging the procedural efficacy of the petition. The respondent urges that the petitioner cannot obtain certiorari review here because it did not exhaust its appellate remedy in the state courts; it urges that a direct appeal could have and should have been taken to the Florida Supreme Court—the state's highest court—from either the judgment of the trial court or the decision of the district court of appeal, and failure to prosecute such an appeal is procedurally fatal (28 U.S.C. §1257). We disagree for many reasons.

a. The Florida Constitution (Article 5, §3(b)(1)) provides in relevant part that the Florida Supreme Court "shall hear appeals . . . from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution."[1]

Here, review was sought by ordinary direct appeal from a final judgment to the Third District Court of Appeal of Florida (Fla. Const., Art. 5, §4(b)); then review from the decision of that court was sought in the Supreme Court of Florida, by petition for writ of certiorari under Fla. Const., Article 5, §3(b)(3),[2] on the ground that the district court of appeal decision was "in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same question of law."

The Third District Court of Appeal entertained the appeal on the merits and rendered a decision on the merits (305 So.2d 59; A.-F, E). The respondent never objected—as appellee—to the jurisdiction of the Third District Court of Appeal, and indeed, now seeks to avail itself of the benefits of that affirmance.

The Florida Supreme Court initially *granted* the petition for a writ of certiorari (A.-D), then discharged it specifically because it found no direct conflict of Florida decisions (336 So.2d 1145; A.-C, B). The petition *was not* dismissed or denied for failure to invoke the appropriate remedy. The petition was entertained, and passed upon, on the direct conflict contentions.

b. Thus, we need not, most respectfully, embroil ourselves in the complex, highly developed, and frequently

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1. Repeated in Florida Appellate Rules, 2.1(a)(5).
2. See also, Fla.App. Rules, 2.2.

litigated issues of Florida law, on whether a direct appeal to the Florida Supreme Court would—or would not have—been appropriate, from either the trial court judgment, or the district court of appeal judgment—or whether either of those determinations was one "initially and directly" passing upon the "validity" of a state statute, within the highly developed and litigated meaning of the Florida Constitution; or was one "construing a provision of the state or federal constitution".

For example, there can be no question that the trial court and district court of appeal determinations *did not* "construe" any constitutional provisions within the meaning of Art. 5, §3(b) of the Florida Constitution, because they did not even *mention* any such provision, much less "explain, define or otherwise eliminate existing doubts arising from language or terms of a constitutional provision". *Ogle* v. *Pepin*, Fla.1973, 273 So.2d 391, 392-393. Thus no direct appeal to the Supreme Court of Florida ever was possible under that proviso.

Moreover, the trial court and district court of appeal did not actually discuss the validity of the statutes, but apparently interpreted them and held that they were "inapplicable" to Financial Federal (A.31-32; 21). A nice question was presented under Florida law as to whether either court passed "initially" and "directly" (expressly or inherently) upon the "validity" of a statute at all; see, *Snedeker* v. *Vernmar, Ltd.*, Fla.1963, 151 So.2d 439; *cf. Stein* v. *Darby*, Fla.1961, 134 So.2d 232; within the esoteric meaning and language of Art. 5, §3(b)(1).

c. All of this is irrelevant, because the procedural techniques for review in the Florida Courts, and up to and through the Florida Supreme Court, have passed muster in those courts, under the Florida Constitution.

i. The Third District Court of Appeal reviewed the initial appeal on the merits. No objection to its jurisdiction was made. If the trial court judgment "initially" and "directly" passed upon the validity of a state statute within the meaning of Article 5, §3(b)(1) of the Fla. Const., "*exclusive*" jurisdiction over the appeal would have vested in the Florida Supreme Court—and *not* in the Third District; *Couse* v. *Canal Authority*, Fla.1968, 209 So.2d 865, 866; *Robinson* v. *State*, Fla.1961, 132 So.2d 3.

ii. If the trial court judgment "initially" and "directly" passed on the validity of the statutes, the decision of the Third District Court of Appeal would have been a *nullity; Robinson* v. *State*, Fla.1961, 132 So.2d 3. Only the Florida Supreme Court would have had Florida Constitutional authority to review the judgment. Yet the Third District indeed reviewed the judgment; and the Florida Supreme Court did not vacate the decision of the Third District, but treated it as efficacious in every way; and granted and then discharged a writ, thereby approving legality of the Third District decision at the very least, and the jurisdiction of the Third District to render it.

iii. If the trial court decision passed "initially" and "directly" on the validity of the statutes, the Third District Court of Appeal of necessity would have—under Florida law—simply transferred the case to the Florida Supreme Court for full review on the merits; the only thing it would be empowered to do under Florida law. But *in no* event could it have passed on the merits, or dismissed the appeal. In Florida, an appeal to the wrong Court results simply in transfer to the correct one (Fla. Const., Art. 5, §2(a)); and see, *State ex rel. Soodhalter* v. *Baker*, Fla.1971, 248 So.2d 469; Fla.App. Rule 2.1(a)(5)(d).

iv. The nature of the holdings of the trial court (A.31-32) and district court of appeal (A.21) were similar if

not exact. So if there were no basis for direct appeal to the Supreme Court from the trial court, there was no basis for direct appeal from the Third District. Both types of direct appeal to the Florida Supreme Court—from either lower court—would require the same showing (Article 5, §3(b)(1), Fla. Const.)

v. Nor can the respondent claim that an improper remedy or vehicle (certiorari) for Florida Supreme Court review of the district court of appeal decision was attempted unsuccessfully; and that a full direct appeal could have been had in the Florida Supreme Court, but was not. If appellate jurisdiction [as opposed to certiorari jurisdiction] existed in the Florida Supreme Court, then Florida Supreme Court would have been bound by the Florida Constitution to treat the petition for a writ of certiorari as an appeal, under Article 5, §2(a) of the new Florida Constitution (1968), in effect at all stages of the relevant proceedings here. That provision shows that no "proceeding" in the Supreme Court or District Courts of Appeal may be dismissed "because an improper remedy has been sought."

Unlike the old law cited by respondent (pg. 8, *Bartow Growers Proc. Corp.* v. *Fla. Gr. Proc. Corp.*, Fla.1954, 71 So.2d 165), a petition for a writ of certiorari now is indeed to be treated as a notice of appeal where appeal is the appropriate remedy for review; *State* v. *Johnson*, Fla.1974, 306 So.2d 102; *Whitlow* v. *State*, Fla.1975, 313 So.2d 748; *City of Miami* v. *Southeast First Nat. Bk. of Miami*, Fla. App.3rd D.C.A. 1975, 320 So.2d 836, 837.

vi. The Florida Supreme Court was here aware of the lower court determinations, the points raised, and the nature of our constitutional argument (A.32-38). Nevertheless the Court entertained a petition for certiorari addressed to the district court decision and granted it

(A.13-14) only to discharge it because, after initially perceiving a direct conflict with prior Florida decisions (A.13-14), it then found *no* direct conflict. It never suggested full appeal jurisdiction.

There was no vacatur of the district court decision on grounds that a direct appeal from the trial court was the exclusive remedy; no finding that a direct appeal would be from either of the lower court decisions; and no treatment of the proceedings as a full appeal. Moreover, the Supreme Court of Florida found no conflict with 14th Amendment cases, in any event (see claims of conflict in Fla. Sup. Ct., footnotes, A.36-38; A.4, 7), so under Florida law, the appropriate efforts for review of the constitutional claim were exhausted in the highest court of the state and were found wanting, although erroneously from a federal constitutional viewpoint.[3]

vii. In any event, a review was sought, in the Florida Supreme Court, of the Constitutional issue and was denied. No matter what was selected by the petitioner out of possible remedies available, the Supreme Court of Florida rejected the Constitutional claim in denying jurisdiction. Had appeal been available—the Florida Supreme Court—

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3. Perhaps a certiorari petition and a full appeal, in certain instances, properly could invoke the jurisdiction of the Florida Supreme Court in the same case: *Tyson* v. *Lanier*, Fla.1963, 156 So.2d 833; 156 So.2d 841. Then, the Florida Supreme Court would dispose of the case under one or the other of the procedures on the merits. Here, review was sought by cert., which was denied.

This method of review sought to bring before the Florida Supreme Court issues on statute of limitations, usury, statutory interpretation; intent; and spreading of interest over a long term financing agreement. We did not seek to invite review of only a constitutional issue. And we did exhaust our state remedies by an alternative procedural method—the correct one.

If a direct appeal were appropriate, the Florida Supreme Court would have treated the matter as an appeal and reviewed on the merits (Art. 5, §2, Fla. Const.; *State* v. *Johnson*, supra; *Whitlow* v. *State*, supra) the Constitutional issue, under present law, and any other issues it believed meritorious.

aware of its jurisdiction, would have treated the proceeding as an appeal. It disposed of the case on certiorari (compare, *Tyson*, supra), finding no jurisdiction [and thus no appeal allowable, nor even necessary to determine the case]. We properly selected a remedy, and sought review in the state's highest court. However the procedure is viewed, state remedies were exhausted.

We timely filed our petition in this court, addressed to the District Court of Appeal decision, after discharge of the Florida Supreme Court writ of certiorari. No Florida procedural ground precludes the grant of a petition here. See, *Randall* v. *Bd. of Commissioners*, 261 U.S. 252, 43 S.Ct. 252 (1923); *Amer. Express Co.* v. *Levee*, 263 U.S. 19, 44 S.Ct. 11 (1923).

II. Petitioner at All Relevant Stages Challenged Constitutionality of Interpretation of Florida Statutes Which Were Excluded From Usury Exemptions; Issue Properly Raised Whether Florida Courts Specifically Wrote Opinions on It or Not (Point II of Respondent Without Merit).

It is not material in this Court whether or not the trial court or district court of appeal "directly" and "initially" passed upon the validity of the state exemption statutes, within the meaning of the Florida Constitution, so as to allow a direct appeal to the Florida Supreme Court. As we have seen, the Florida courts and particularly the Florida Supreme Court determine their own jurisdiction; and on the procedural history of the case, it is clear that state appellate remedies were exhausted. This does not mean, however, that petitioner did not raise the constitutional issue at all appropriate times in the Florida courts, or that it did not raise the constitutional issue sufficiently to furnish a predicate for a petition for

writ of certiorari in this court. Indeed, whether the petitioner sufficiently raised a constitutional issue, concerning constitutional validity of a statute in the trial court or state courts, is uniquely a federal question, for this court to determine. And the sufficiency of the invocation of a constitutional question, or the preservation of a constitutional question, under the Federal Constitution, requires no magic words. The claim of unconstitutionality in a state statute or application of a statute may be raised in the trial court—or in the state appellate courts—by any words and methods which suffice to call the contention to the attention of those courts. A clear intendment to raise the issue is sufficient: *Street* v. *New York*, 394 U.S. 576, 89 S.Ct. 1354 (1969); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63 (1928). Viewed in this light, there can be no question that the constitutional contention was raised at all appropriate stages in the state courts, including the appellate court.

a. The petitioner urged in the Florida trial court that an interpretation which exempted only domestics and not federals would be unconstitutional under the 14th Amendment (A.43-44). The trial court held that Financial Federal was not exempted from the usury acts (A.32).

b. Federal appealed to the Third District Court of Appeal challenging that ruling (A.41-42).[4]

c. At page 7 of both its main brief and reply brief in the Third District Court of Appeal, the appellant (petitioner here) urged that the trial court's interpretation of

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4. Florida Appellate Rule 3.5(c) requires only an assignment of error which identifies the judicial act complained of. Reasons are not required. The petitioner, on appeal to the Third District Court of Appeal, claimed error in the judicial act or ruling finding non-exemption of Financial Federal (A.41-42). This was sufficient to furnish a predicate for arguing constitutionality of course.

the exemption statutes, or those interpretations for which the appellee (respondent) contended, were "constitutionally suspect" and "would surely have violated the Florida and the Federal Constitutions" (A.40-41).

d. The Third District Court of Appeal held that the Florida exemption statutes applied only to domestic associations and not to foreign associations such as the defendant Financial Federal (A.21).

e. As shown in the petition (pg. 12), on rehearing, Financial Federal pointed to the serious and substantial constitutional issue which the Third District Court of Appeal had overlooked (A.39). The petition for rehearing was denied by the Third District Court of Appeal (A.15).

f. On petition for a writ of certiorari, the petitioner here raised among other things, a contention of direct conflict between the decision of the Third District Court of Appeal and prior Florida decisions under the 14th Amendment (A.37-38). In the brief on jurisdiction, the very same contention was made; a conflict was asserted showing prior Florida decisions construing the 14th Amendment (see footnote, A.36-37).

g. The Florida Supreme Court initially granted the writ of certiorari (A.13). And the petitioner filed a brief on the merits, urging that the Third District Court of Appeal interpretation of the Florida statutes was unconstitutional under the 14th Amendment and the Supremacy Clause.[5] On the merits, both Florida Supreme Court deci-

5. The petitioner, on the merits, was no longer restricted to showing a conflict with prior Florida decisions. So, the Supremacy Clause violations, as well as the 14th Amendment violation, now was asserted—in the Florida effort to regulate a Federal institution in an arbitrary manner, to the benefit of competing state institutions. The Third District held that state institutions were exempted, but not federals.

sions and United States Supreme Court decisions were cited (A.33-36). After oral argument on the merits, the Supreme Court of Florida discharged the writ, finding no jurisdiction, because, it held the decision on statutory construction in the Third District did not conflict with prior decisions in Florida. A Florida Supreme Court dissenting opinion (in the four to three decision) challenged the discriminatory interpretation of the usury exemption statutes (A.3-12), under the Supremacy Clause, citing cases.

The Financial Federal Savings and Loan Association again filed a petition for rehearing and again urged and flatly contended that the unequal treatment afforded to this federal institution, having virtually the "identical powers" as domestic savings and loan associations rendered the statutes—as construed—unconstitutional, under both the 14th Amendment and the Supremacy Clause (Article 6); insofar as it attempted to exclude federal savings and loan associations (A.33). The petition for rehearing was denied (A.2).

Thus, the Financial Federal Savings and Loan Association initially attempted to demonstrate that the usury exemption statutes of Florida clearly applied to federal savings and loan associations as well as domestic ones, under their clear wording, and under the edict that statutes should be construed to avoid constitutional problems where possible. However, the trial court found that Financial Federal Savings & Loan Association was not exempted; and the Third District Court of Appeal found that the usury exemption statutes applied only to domestic associations and not foreign ones like Financial Federal. Financial Federal challenged any discriminatory interpretation of the statutes at all relevant points. The point was preserved.

Most assuredly then, the constitutional issue sufficiently was preserved in the trial court; and in the Third District Court of Appeal; and in the Florida Supreme Court. The intendment was clear, *Street* v. *New York*, supra, 394 U.S. 576; *New York ex rel. Bryant* v. *Zimmerman*, supra, 278 U.S. 63, 67. The matter was argued appropriately in the briefs in the Third District Court of Appeal under appropriate assignments of error; *cf. Herndon* v. *Georgia*, 295 U.S. 441, 55 S.Ct. 794. The constitutional issue may not be avoided by a contention that it was not appropriately preserved in the Florida courts, even though discussion of the constitutional issue, for some reason, was not contained in the decisions.

III. Grave and Important Constitutional Reasons Exist for Granting Writ (Point III of Respondent Without Merit).

The petitioner has addressed its petition to the decision of the Third District Court of Appeal of Florida—the highest state court which rendered and could have rendered a decision here. That decision held that the exemption statutes exempted domestic building and loan associations from the usury laws; but not federal savings and loan associations. We have shown in our petition that there is no substantial difference between domestic building and loan associations and federal savings and loan associations, nor do the statutes even contemplate any differences nor suggest any differences; and indeed the exemption provisions are applicable to both (F.S.665.161; 665.01; 665.40; 687.031; 665.18 (1967); see petition, pgs. 6-8). The petition shows the similarities between the two types of associations with particularity (pgs. 22-24). There is no difference between the two types which would justify legislation favoring domestic building and loan associations at the expense of federal savings and loan associations.

The differences between the two in 1967 and now, have no relation to a legitimate reason for exempting domestics, to the detriment of federals. The equal protection mandate of the Federal constitution forbids the construction of the Florida courts below. So does the supremacy clause. Under the Florida statutes recited, clearly federal savings and loan associations like Financial Federal must be exempted from the usury laws to the same extent as are domestics. Any other interpretation under the statute is unconstitutional for unfair and unequal discrimination (United States Constitution, Amendment 14; *Morey* v. *Doud*, 354 U.S. 457 (1957); no "rational basis" for discrimination, even if strict scrutiny not required). Residency—without more—or place of incorporation or charter of entities with virtually identical powers is not a legitimate basis for a discriminatory classification in statutes like these; *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490 (1927). Certainly a desire to favor a state association over a federal one does not suffice; see, for example, *Morey* v. *Doud*, 354 U.S. 457 (1957); *Dukes* v. *City of New Orleans*, 5 Cir. 1974, 501 F.2d 706.

A federal savings and loan association, of course, is a "building and loan association" under F.S.665.01. The terms are synonymous (see 12 U.S.C. 1424a; and 1724a-1730). Such associations are regulated by the federal home loan bank board pursuant to federal statute commonly known as Home Owners Loan Act of 1933 ("H.O.L.A." as amended; 12 U.S.C. 1437b; 1464a).

An effort by the Florida Legislature to favor a domestic association to the detriment of a federal one, by exempting domestics from usury laws, but not federals, and thus to regulate the federal institution in such a discriminatory manner, is unconstitutional (Amendment 14; and Article 6; U. S. Const., supremacy clause). A state

may not discriminate by legislation against a federal institution, or against an entity operating under federal auspices or license in such a manner. See, *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 81 S.Ct. 659 (1961); *United States* v. *Massachusetts Tax Commission*, 481 F.2d 963 (1 Cir. 1973); *Dukes* v. *City of New Orleans*, supra; *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 751 (1961); *Phillips Chem. Co.* v. *Dumas Indep. School Dist.*, 361 U.S. 376 (1960); *Perez* v. *Campbell*, 402 U.S. 637, 648, 650 (1971).

A state cannot by legislation create a dual standard under which a loan made by a federal association is treated differently from the same loan made by a substantially identical state chartered institution, to the detriment of the federal institution on the sole rationale that they have been chartered by different authorities. See, *U. S.* v. *State Tax Commission*, 1 Cir. 1973, 481 F.2d 963, 967-970; *Michigan National Bank* v. *Michigan*, supra.

The respondent's argument below was that domestic associations were entitled to special treatment because they could only make loans to members. The "loans to members only" requirement appears to have been eliminated long prior to the time the instant case arose (see, F.S.665.21 (5) (1967)); and the argument is inaccurate and has nothing to do with the unreasonable classification here anyhow. Both institutions presently are treated the same (F.S.665.-511), which illustrates further lack of recognition of any rational basis for classification.

Where a state statute clearly attempts to encompass and protect a certain class, it may not constitutionally exclude, or be interpreted to exclude, persons or entities, who fall within the clear ambit of the statute, for some artificial, discriminatory and arbitrary reason. Such persons or entities must be deemed to fall within the ambit of the statute. *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guaranty and Liability Ins. Co.*, 391 U.S. 73 (1968); *Weber* v. *Aetna Gas Co.*, 406 U.S. 164 (1974). Here, Financial Federal of necessity falls within the ambit of the statute exempting savings and loan associations from the Florida usury laws.

Of course, under Florida's new statutory scheme, as we have seen, effective June 2, 1969, federal savings and loan associations clearly are exempt.[6]

The unconstitutionality of the statutes as interpreted by the Third District Court of Appeal to exclude federals, and the merits, walk hand in hand here. For the decision of the Third District Court of Appeals is wrong for many reasons. Had the parties been able to carry out their original concept of 360 long-term loans, this case would never have arisen. The mere fact that a rollover had to be used so a valid mortgage would exist during construction should not entitle plaintiff (respondent) to free financing of its whole project; nor should procedural business difficulties in which the parties became embroiled even imply that the resolution was concocted by the Federal as part of a corrupt scheme or device to evade the usury laws from which local savings and loan associations are exempted, to the detriment, as the Florida courts apparently have held, of highly competitive, similarly situated federal institutions.

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6. As we have shown in our petition, under Florida's new statutory scheme, effective June 2, 1969, federal savings and loan associations clearly are exempt, together with domestics. However, the decision here is vitally important from a constitutional point of view, because if permitted to stand, it will serve as a precedent which enables federal savings and loan associations with substantially the same powers as domestic building or savings and loan associations to be discriminated against, in a highly competitive business, to the benefit of domestics and to the detriment of federals.

Most respectfully there is no way that the judgment and decision of the Third District Court of Appeal should be permitted to stand; in the light of the clear-cut Florida statutes exempting savings and loan associations—which constitutionally must include federal savings and loan associations, where, as here, they have been held to exclude domestics.

It is impossible to tell just how and why the Third District Court of Appeal ruled as it did in the light of the constitutional argument. But an affirmance could not constitutionally have resulted in the light of the constitutional challenge made; and the matter indeed was preserved. Accordingly, this Court may and should, most respectfully, grant the petition; see *Street* v. *U. S.*, supra, 394 U.S. 576, 89 S.Ct. 1354.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision and judgment of the Third District Court of Appeal of Florida should be quashed and reversed with directions to the trial court to enter judgment for the petitioner. Certainly, most respectfully, this court should review the matter. The Third District Court of Appeal has passed upon, or impermissibly ignored, an issue of U. S. constitutional law and has construed a statute in direct contravention of the Fourteenth Amendment and Article 6. Accordingly, under Rule 19a of the Rules of this Court, certiorari review is indicated because the Third District Court of Appeal of Florida has most assuredly decided the case in a way that is not in probable accord

with decisions of this Court. Review is warranted in this important area of constitutional law.

Respectfully submitted,

SAM DANIELS, ESQUIRE
1414 duPont Building
Miami, Florida 33131

and

PODHURST, ORSECK & PARKS, P.A.
Suite 1201, 25 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioner

By ROBERT ORSECK

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Reply Brief of Petitioner have been mailed this ..... day of December, 1976 to: LAPIDUS & HOLLANDER, Attorneys for Respondent, Suite 2222, First Federal Building, One S.E. Third Avenue, Miami, Florida 33131, in accordance with Rule 33 of this Court.

By ROBERT ORSECK